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REPORTS
OF
CASES DECIDED
IN THE
SUPREME COURT

OF THE
STATE OF INDIANA,

WITH TABLES OF CASES REPORTED AND CITED, TEXT-
BOOKS CITED, STATUTES CITED AND
CONSTRUED, AND AN INDEX.

0

GEO. W. SELF,
OFFICIAL REPORTER.
SOL. H. ESAREY, Assistant Reporter.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. JAMES H. JORDAN.§*

HON. OSCAR H. MONTGOMERY.||†

HON. JOHN V. HADLEY.‡

HON. LEANDER J. MONKS.§

HON. JOHN H. GILLETT.§§

*Chief Justice at May Term, 1906.

†Chief Justice at November Term, 1906.

§Elected in 1894, reëlected in 1900 and 1906.

‡Elected in 1898, reëlected in 1904.

§§Appointed January, 1902; elected in 1902.

||Elected in 1904.

OFFICERS
OF THE
SUPREME COURT

ATTORNEY-GENERAL
CHARLES W. MILLER.

REPORTER
GEO. W. SELF.

CLERK
ROBERT A. BROWN.

SHERIFF
MICHAEL McGUIRE.

LIBRARIAN
OMAR O'HORROW.

(xxx)

CASES DECIDED
IN THE
SUPREME COURT
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY AND NOVEMBER TERMS, 1906,
IN THE NINETIETH AND NINETY-FIRST
YEARS OF THE STATE.

SPURGEON ET AL. *v.* RHODES.

[No. 20,728. Filed June 19, 1906.]

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171	250

1. **INJUNCTION.** — *Temporary.—Evidence.—Affidavits.—Information and Belief.*—It is sufficient, where a temporary injunction is prayed, for the plaintiff to file his affidavit setting forth the facts upon information and belief, supported by an affidavit of the facts by some person cognizant thereof. p. 7.
2. **SAME.** — *Temporary.—Evidence.—Affidavits.—Information and Belief.—No Denial.*—A temporary injunction may be granted upon plaintiff's affidavit upon information and belief where the defendant, after notice, fails to deny the truth of the matters alleged. p. 7.
3. **SAME.** — *Temporary. — Evidence.—Complaint.*—Mere allegations in a complaint, of apprehensions or fears, unsupported by proof will not sustain an injunction. p. 7.
4. **SAME.** — *Temporary. — Evidence. — Discovery. — Information and Belief.*—Plaintiff in an application for a temporary injunction is entitled to a discovery from defendant upon setting out the facts upon information and belief; and if defendant, after opportunity given, fails to deny same, the court may grant such injunction. p. 8.
5. **SAME.** — *Temporary.—State Board of Medical Registration and Examination.—Physicians.—License.*—Plaintiff's affidavit upon information and belief that the state board of medical registration and examination has conspired with the prosecuting witness to have charges filed against him, and that such board will revoke his license without any trial, supported by an affidavit of certain alleged admissions by the board's attorney, does not

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sustain a temporary injunction, where the members of such board by affidavits deny the allegations against them, and their attorney likewise denies such alleged admissions. p. 9.

6. **INJUNCTION.**—*Temporary.*—*Prosecuting Witness Outside of State.*—*Effect.*—The fact that the prosecuting witness is outside of the State is no ground for an injunction to prevent the State Board of Medical Registration and Examination from trying the plaintiff, a licensed physician, upon the charge of immoral conduct, in a proceeding to revoke his license. p. 9.
7. **EVIDENCE.**—*Admissions of Attorney.*—Admissions of an attorney at law are not evidence against the client. p. 10.
8. **CONSTITUTIONAL LAW.**—*Constitution of United States.*—*Whether Applicable to State Laws.*—Article 3, §2, and the fifth and sixth amendments of the United States Constitution do not apply to laws enacted by the states, but only to prosecutions in the United States courts. p. 10.
9. **SAME.**—*Physicians.*—*License.*—*Police Power.*—Prescribing the qualifications of physicians and surgeons and regulating the practice of such professions, are valid subjects of legislation under the police power. p. 11.
10. **SAME.**—*Physicians.*—*License.*—*Revocation.*—Statutes providing for the revocation of the license of a physician, for felony or gross immorality, do not violate the United States or state Constitutions. p. 12.
11. **PHYSICIANS.**—*License.*—*Revocation.*—*State Board of Medical Registration and Examination.*—*Courts.*—The grant of a license to a physician, or its revocation, by the State Board of Medical Registration and Examination, is not the exercise of judicial power. p. 12.

From Marion Circuit Court (14,307); *W. J. Buckingham*, Judge. (Acting under §1161 Burns 1901, Acts 1899, p. 537.)

Suit by John Milton Rhodes against W. A. Spurgeon and others. From an interlocutory decree for plaintiff, defendants appeal. *Reversed.*

Charles W. Miller, Attorney-General, and *Gavin & Davis*, for appellants.

Daniel L. Brown, Jr., and *Frank P. Baker*, for appellee.

MONKS, J.—It appears from the record that in 1899 appellee was duly licensed to practice medicine in Marion

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county, Indiana, and since that time has been engaged in such practice. In June, 1905, a writing making specific charges of acts of gross immorality, verified by the affidavit of Eva Boykin, was presented to the State Board of Medical Registration and Examination under §7322 Burns 1901, Acts 1901, p. 475, §1, asking that his license be revoked therefor. Said board fixed a time and place for the hearing of said charges and gave appellee notice thereof as required by §7322, *supra*. Thereupon, before the time fixed for said hearing, appellee brought this suit to enjoin appellants, the members of said board, from proceeding to hear and determine charges of "gross immorality" which were then pending against him before said board, and from revoking his license to practice medicine. A temporary injunction was granted by the judge in vacation upon notice to appellants, and from such order this appeal was taken. It is insisted by appellants that the court erred in granting said temporary injunction.

Section 7319 Burns 1901, Acts 1899, p. 247, §1, authorizes the granting of a license to practice medicine upon a certificate issued by the State Board of Medical Registration and Examination. Section 7322, *supra*, provides that any such license may be revoked by said board, if the person holding the same is "guilty of a felony, or gross immorality, or is addicted to the use of liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery." Said section provides further: "A specific written charge, verified by affidavit, must be presented to the board, making definite and specific charges of such facts against the holder of such license. The board shall thereupon fix a time and place for the hearing of such charges, at which the person charged may appear and defend against the same. A copy of such charges, together with a notice of the time and place fixed for the hearing, shall be served upon the person so charged at least twenty days before the time set for the hearing of the same. If, after such hearing,

the board revokes such certificate and license, such order shall be by said board entered upon its record." In case the board revokes the license an appeal may be taken to the circuit or superior court of the county in which said license was issued. On appeal the verified charges are treated as the complaint and "the accused may plead to said charges and issues may be formed thereon as in any civil case."

The complaint averred that the individual appellants were members of and composed the State Board of Medical Registration and Examination; that in 1899 the appellee was duly licensed to practice medicine in Marion county, and has since that time been engaged in such practice, and that this right is of value to him and is a property right; that the board has "conspired with one Eva Boykin fraudulently to deprive" appellee of his license; that in pursuance of said conspiracy said board employed said Eva Boykin to visit him and to attempt to induce him to commit an abortion upon said Eva Boykin, and in furtherance of said conspiracy said board hired said Eva Boykin to file affidavits before it; that the appellee had been notified by the board of the filing of charges against him, charging him with gross immorality and for answering which he was required to appear before the board on August 16; that he was thus required to appear under and by virtue of authority, claimed to be conferred by an act regulating the practice of medicine as amended in 1901, which provided, that upon charges of gross immorality a license might be revoked by the board; that the charge against him as given—gross immorality—is a "fraudulent one," made by said Boykin at the instigation of said board, and in furtherance of the conspiracy she filed said affidavit before said board, and charged him with unfitness to practice medicine in that he, believing the affiant to be pregnant, had agreed to perform an abortion upon her; that said Eva Boykin, the secret employe and co-conspirator of said board, acting for and on its behalf and in furtherance of said conspiracy, filed the at-

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tached fraudulent affidavit, charging this petitioner with gross immorality such as to unfit him for practice; "that it is the intention of said board to hear and determine said charges, and said board intends and will, as previously conspired, revoke the license of your petitioner unless restrained from so doing by this court;" that said board has "fraudulently conspired" with said Eva Boykin to deprive the appellee of his license," in that said Eva Boykin was employed and paid by said board to visit certain physicians, among them the plaintiff, and then to make affidavit against them; that said Eva Boykin is outside of the State of Indiana and a fugitive from justice; that said board will not produce her at the hearing of the charges against the appellee; that said board will not allow the appellee to produce witnesses in his defense; that the attorneys for said board have announced that said board intend to revoke the appellee's license, and that he will not be accorded the right to examine his accusers under oath; that the hearing of said charges will work great harm and injury to the appellee in his business and profession, and will injure his reputation, whether they are sustained or not, and whether said license is revoked or not." Wherefore he asks for a permanent injunction and temporary restraining order preventing said board from trying the appellee and from revoking his license.

The charges show that the appellee had offered to perform this abortion upon said Eva Boykin, believing her to be pregnant, for \$10, \$15 or \$25, according to the character of the operation. This complaint was sworn to by the appellee, who states that the matters and facts therein contained are true "as he is informed and verily believes." An affidavit of a person not a party to this proceeding was filed in support of said application for injunction, which stated that an attorney for appellants had said to affiant "that said Eva Boykin and a man whose name he had

agreed not to disclose were gathering evidence against physicians, and that certain doctors, among them Doctor Rhodes (appellee), had been notified to appear before the board for trial, as they desired to make some examples in order to stop abortions; that Eva Boykin was a 'tool' or 'stool pigeon,' and had been employed by the board to gather evidence; said attorney further stated to said affiant that the board would not have said Eva Boykin at the trial of said Rhodes; that, in fact, the board would introduce no testimony in any of the cases then pending, other than the affidavits which were filed against the physician on trial." This affidavit and the verified complaint were all the evidence given by the appellee at the hearing of said application.

The affidavits of five members of the board were read in evidence. These affidavits were substantially the same, and each alleged that no steps of any kind had been taken or would be taken wrongfully to deprive appellee of his license; that Eva Boykin had not been hired to make said affidavits; that said board had no intention of revoking appellee's license unless the evidence, when heard, justified and required it; that it is not true that said board will not allow appellee to produce witnesses in his defense, but, on the contrary, it is and always has been the intention of said board in this case, and the uniform practice of said board in like cases, to permit oral evidence and the examination of witnesses if the party so desires; that the members of said board had no other intention or purpose than to hear the evidence, and then fairly and impartially determine his rights as the law and the preponderance of the evidence require.

Appellants also read in evidence the affidavit of their attorneys which states that said attorneys never said that the board intended to revoke appellee's license, nor did the board, so far as their information and knowledge go, have

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any such intention, or any intention, except to hear the evidence and fairly determine whether or not the charges were sustained.

Appellants contend that appellee's affidavit, being only upon information and belief, cannot be accepted in a court when the matter is in controversy. It has been held

1. as a general rule that when a party seeks a temporary restraining order, which in this State is without notice, if the facts and circumstances are not within his personal knowledge he should state them upon his information and belief, and annex or file therewith the affidavit of some other person having personal knowledge of the facts alleged, that the same are true upon his personal knowledge of the facts. 2 Beach, Mod. Eq. Prac., §767, and cases cited; 1 High, Injunctions (4th ed.), §35; 2 High, Injunctions (4th ed.), §§1567, 1569, 1574, 1575, 1581; Gibson, Suits in Chancery, §818; *Campbell v. Morrison* (1838), 7 Paige 157; *Bank of Orleans v. Skinner* (1841), 9 Paige 305; *Youngblood v. Schamp* (1862), 15 N. J. Eq. 42; *Manistique Lumbering Co. v. Lovejoy* (1884), 55 Mich. 189, 20 N. W. 899; *Brooks v. O'Hara* (1881), 8 Fed. 529; *Ballard v. Eckman* (1884), 20 Fla. 661, 675, 676.

As to the correctness of the rule we need not decide, for the temporary injunction was granted upon notice to appellants, and in such a case the fact that many or all

2. of the material averments of the application are stated upon information and belief will not prevent the granting of the relief when the defendant in no manner denies such averments. *Gibson v. Gibson* (1879), 46 Wis. 462, 1 N. W. 154. The mere apprehensions or fears of a complainant, unsustained by fact, do not constitute

3. a sufficient ground for the interference of equity by injunction. Not the complainant, therefore, but the court, must determine that a wrong is about to be com-

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mitted which will be irreparable before the relief will be granted. 1 High, Injunctions (4th ed.), §35; 2 High, Injunctions (4th ed.), §§1567, 1569, 1571, 1574, and cases cited; *Attorney-General v. Bank of Columbia* (1829), 1 Paige 511; *Campbell v. Morrison*, *supra*; *Youngblood v. Schamp*, *supra*; *Warfield v. Owens* (1846), 4 Gill (Md.) 364, 382; *Goodwin v. New York, etc., R. Co.* (1876), 43 Conn. 494.

In *Campbell v. Morrison*, *supra*, at page 160, it was said: "The complainant does not profess to know anything of the facts upon which his application for an injunction 4. is founded. He therefore merely swears to his information and belief; which information may have been derived from those who were no better informed than himself on the subject. Such an allegation is undoubtedly sufficient in a bill to call for a discovery from the defendant of the fact thus stated; and it may in certain cases be sufficient to authorize the issuing of an injunction, where the defendant has had an opportunity to be heard in opposition to the application. * * * *Attorney-General v. Bank of Columbia* [1829], 1 Paige 511."

The chancellor said in *Attorney-General v. Bank of Columbia*, *supra*, at page 515: "Where a party cannot be presumed to have positive knowledge of a fact, it is the constant practice of this, and of all other courts, to permit him to swear to his information and belief; and give the adverse party, who alone can swear positively on the subject, an opportunity to deny it on oath. If he does not deny it, or furnish some explanation to induce the court to think otherwise, the belief of the other party is to be taken as the fact."

In 2 High, Injunctions (4th ed.), §1574, it is said: "And when the motion for a preliminary injunction is heard upon bill and answer, or upon bill, answer and affi-

davits, and the equities of the bill are fully met and negatived, the injunction will not be granted."

Applying the rules above stated governing the granting of temporary injunctions when notice of the motion therefor has been given to the defendant, it is evident

5. that the evidence given in this cause was not sufficient to sustain the allegations of the complaint. It is not necessary, therefore, for us to decide, and we do not decide, whether, if said allegations had been established by sufficient and proper evidence, appellee would have been entitled to a temporary injunction.

It will be observed that the affidavit of appellee to the complaint, which was read in evidence, was on his "information and belief" only, and that no evidence was given of the truth of the facts alleged in the complaint by any person having personal knowledge thereof; that the affidavits of the five members of the board and their attorneys deny every possible wrong charged in the complaint. The allegation to the effect that Eva Boykin was employed to procure evidence in regard to the character of appellee is not denied, but this alone would not authorize the granting of a temporary injunction. The gist of the complaint is that appellants had prejudged appellee's case and had intended to revoke his license without any evidence and without giving him a hearing. Said affidavits of appellants and their attorneys deny the charge and say, in effect, that they intend to and will give him a fair and impartial hearing, and will determine said charges according to the evidence. This is all he is entitled to demand.

The fact that Eva Boykin is not in this State and cannot be compelled to attend the hearing of said charges, or that the board would try said charges without her pres-

6. ence or testimony, furnished no ground for enjoining the board from hearing and determining the truth of said charges.

The affidavit in regard to the statement made by the attorney for appellants adds nothing to the complaint, and does not tend to support it for the reason that

7. said attorney was not a member of said board, and his statements were not proper evidence against appellants.

It is next insisted by appellee that said temporary injunction was properly granted for the reason that §7322 Burns 1901, Acts 1901, p. 475, §1, so far as it at-

8. tempts to confer on said board the power to try appellee and determine whether he is guilty of the gross immorality charged, and to revoke or refuse to revoke his license therefor, is wholly unconstitutional and void, in that it attempts to confer upon said board judicial power; that it is in violation of the fifth amendment of the Constitution of the United States, which provides that "no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment by a grand jury," and of the sixth amendment of the same Constitution which provides that "in all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor" in this: that no provision is made in said section or act for compelling the attendance of appellee's witnesses by compulsory process; that §7322, *supra*, violates §2, article 3, of the Constitution of the United States, which provides that "the trial of all crimes, except in cases of impeachment, shall be by a jury."

As to appellee's contention in regard to §2, article 3, of the Constitution of the United States and the fifth and sixth amendments of the same Constitution, it is sufficient answer to say that the facts stated in the charges, the trial of which appellee seeks to enjoin in this case, do not constitute a public offense, nor is it claimed that they constitute such offense; but, even if they did, said provisions of the Constitution of the United States do

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not affect or apply to prosecutions or proceedings in the courts of the states or to laws enacted by the legislatures of the states, but only to proceedings and prosecutions in the courts of the United States and laws enacted by congress. Cooley, Const. Lim. (7th ed.), 46, and cases cited in notes 4 and 5; *Twitchell v. Commonwealth* (1868), 7 Wall. 321, 19 L. Ed. 223; *Barron v. Mayor, etc.* (1833), 7 Pet. 243, 8 L. Ed. 672; *Herman v. State* (1856), 8 Ind. 545, 552; *Lake Erie, etc., R. Co. v. Heath* (1857), 9 Ind. 558, 559; *Baker v. Gordon* (1864), 23 Ind. 204, 209; *Butler v. State* (1884), 97 Ind. 378, 382; *Lloyd v. Dollison* (1903), 194 U. S. 445, 24 Sup. Ct. 703, 48 L. Ed. 1062; *Capital City Dairy Co. v. Ohio* (1902), 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171; *Barton v. Kimberley* (1905), 165 Ind. 609, and cases cited.

Statutes prescribing the qualifications of practitioners of medicine and surgery, and otherwise regulating the practice of those professions have been uniformly

9. upheld by the courts as a valid exercise of the police power of the states, infringing no provisions of either federal or state Constitutions. *State, ex rel., v. Green* (1887), 112 Ind. 462; *Eastman v. State* (1887), 109 Ind. 278, 58 Am. Rep. 400; *State, ex rel., v. Webster* (1898), 150 Ind. 607, 41 L. R. A. 212, and cases cited; *Parks v. State* (1902), 159 Ind. 211, 59 L. R. A. 190; *Meffert v. State Board, etc.* (1903), 66 Kan. 710, 714, 715, 72 Pac. 247; *People, ex rel., v. Hawker* (1897), 152 N. Y. 234, 46 N. E. 607; *Reetz v. Michigan* (1903), 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; *Dent v. West Virginia* (1889), 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Hawker v. New York* (1898), 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002; 61 Cent. L. J. 424, 425; 22 Am. and Eng. Ency. Law (2d ed.), 780-782; 2 Current Law, 887, 888.

Statutes containing a provision like the one in question here, authorizing the board to revoke a license when the

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holder has been guilty of a felony or of gross immorality, have been held not to violate any provision of the federal or state Constitutions, and it has been held that the granting or refusing to grant a license to practice medicine, or the revocation thereof by the board, is not the exercise of judicial power. 22 Am. and Eng. Ency. Law (2d ed.), 784, 785; 2 Current Law, 888; *State, ex rel., v. Webster* (1898), 150 Ind. 607, and cases cited, 41 L. R. A. 212, and cases cited on page 214; *Town of Greenwood v. State, ex rel.* (1902), 159 Ind. 267, 269; *Wilkins v. State* (1888), 113 Ind. 514; *Ellis v. Steuben County* (1899), 153 Ind. 91; *Meffert v. State Board, etc., supra*; *Meffert v. Packer* (1904), 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350; *State, ex rel., v. State Board, etc.* (1885), 34 Minn. 387, 26 N. W. 123; *State, ex rel., v. State Board, etc.* (1885), 34 Minn. 391, 26 N. W. 125; *State v. State Board, etc.* (1885), 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; *Traer v. State Board, etc.* (1898), 106 Iowa 559, 76 N. W. 833; *State Board, etc., v. Roy* (1901), 22 R. I. 538, 48 Atl. 802; *People, ex rel., v. Hawker, supra*; *Hawker v. New York, supra*.

It was said by this court in *State, ex rel., v. Webster, supra*, at page 621: "While in some respects quasi-judicial, the action of the board is not judicial, any more than is the action of a county surveyor in fixing a boundary line, or of a county superintendent in giving or refusing a teacher's certificate, or the action of numberless other officers or boards in making investigations and decisions in matters committed to them. Neither is the circumstance that an appeal is allowed from a decision of the board an indication that its action is judicial. 'The right of appeal from the action of boards in their administrative character,' it was said by this court in *Board, etc., v. Heaston* [1896], 144 Ind. 583, 55 Am. St. 192, 'is fre-

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quently conferred by statute. The appeal in such cases is not permitted because the action of the board is considered judicial, but it is granted as a method of getting the matter involved before a court that it may be determined judicially.' ”

It is clear that the judge erred in granting the temporary injunction. The order granting the same is therefore reversed.

STATE, EX REL. JETT ET AL., *v.* IVES ET AL.

[No. 20,806. Filed June 19, 1906.]

1. **STATUTES.—Elections.—Municipal Corporations.—Councilmen.**—The act of 1891 (Acts 1891, p. 33, §3484 Burns 1901), providing that vacancies in certain city offices should be filled by appointment of the common council, did not repeal §12 of the act of 1867 (Acts 1867 [s. s.], p. 33, §3480 Burns 1901, §3047 R. S. 1881), providing that in case of a tie vote for municipal candidates, a new election should be ordered. p. 16.
2. **SAME. — Election. — Municipal Corporations. — Councilmen.**—Section 53 of the act of 1881 (Acts 1881 [s. s.], p. 482, §6286 Burns 1901, §4731 R. S. 1881), providing for special elections in certain cases, applies to cities, and was in force at the time of the passage of the act of 1905 (Acts 1905, p. 219), concerning municipal corporations. p. 17.
3. **SAME. — Elections. — Municipal Corporations.—Tie Vote.**—In determining whether a tie vote for councilmen of a city requires a special election, the court, besides considering the municipal corporations act of 1867 (Acts 1867 [s. s.], p. 33, §12, §3480 Burns 1901, §3047 R. S. 1881) and the general election law of 1881 (Acts 1881 [s. s.], p. 482, §53, §6286 Burns 1901, §4731 R. S. 1881), will consider the act of 1905 (Acts 1905, p. 189, §6), providing that in case of a tie vote for municipal officers, such fact should be certified to the tribunal whose duty it is to issue a writ of election to fill the same, as indicating whether the legislature intended that the act of 1905 (Acts 1905, p. 219), concerning municipal corporations, should repeal all former legislation relating thereto. p. 17.
4. **SAME.—Repealing Clause.**—A repealing clause in form: “All former laws within the purview of this act, except laws not inconsistent herewith and enacted at the present session of the

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General Assembly, are hereby repealed," does not repeal all prior legislation which has some relation to the subject of such repealing statute. p. 18.

5. WORDS AND PHRASES. — "*Purview*." — "*Purview*" ordinarily means the enacting part, or body, of a statute, as distinguished from the preamble. p. 18.
6. ELECTIONS.—*Words and Phrases*.—"Vacancy."—*What Is*.—An election held in advance of the expiration of an office is not an election to fill a "vacancy." p. 18.
7. SAME.—*Tie Vote*. — *Vacancy*. — *Statutes*. — The contingency that a tie vote might be cast at the first election held thereunder does not control the construction of the act of 1905 (Acts 1905, pp. 219, 242, §45) so as to cause the office of councilman to become "vacant" at such election, when it could not become "vacant" thereafter in case of a tie vote. p. 19.
8. CONSTITUTIONAL LAW.—*Officers*.—*Vacancies*.—*Municipal Corporations*.—Article 15, §3, of the Constitution, providing that "whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer * * * shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified," applies to municipal officers. p. 19.
9. SAME.—*Officers*.—*Holding Over*.—An officer who holds over because no successor has been elected and qualified, holds by virtue of article 15, §3, of the Constitution, and not by legislative authority. p. 21.
10. STATUTES.—*Officers*.—*Vacancies*.—*Municipal Corporations*.—The failure to elect a councilman does not thereby create a "vacancy" in that office, at the commencement of the new term, by virtue of §45 of the act of 1905 (Acts 1905, pp. 219, 242), providing for filling vacancies in municipal offices. p. 21.
11. SAME.—*Construction*.—*Contemporaneous Legislation*.—The act of 1905 (Acts 1905, p. 219), concerning municipal corporations, must be construed in connection with contemporaneous, kindred legislation. p. 22.
12. SAME.—*In Pari Materia*.—*Construction*.—*Repeal*.—*Implication*.—*Presumptions*.—Ordinarily, statutes concerning the same subject-matter, passed at the same session, must be construed *in pari materia*, the presumption against a repeal by implication being strong. p. 22.
13. SAME.—*Municipal Corporations*.—*Tie Votes*.—*Special Election*.—The act of 1905 (Acts 1905, p. 219), concerning municipal corporations, did not repeal §3480 Burns 1901, §3047 R. S.

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1881, Acts 1867 (s. s.), p. 33, §12, nor §6286 Burns 1901, §4731 R. S. 1881, Acts 1881 (s. s.), p. 482, §53, providing for a special election for certain municipal officers in case of a tie vote. p. 22.

14. **MANDAMUS.**—*Tie Vote.*—*Special Election.*—Mandamus lies to compel the proper municipal officers to order a special election, in case of a tie vote for councilmen. p. 23.

From Carroll Circuit Court; *John C. Nye*, Special Judge.

Action by the State of Indiana, on the relation of William L. Jett and others, against George R. Ives and others. From a judgment for defendants, plaintiff appeals. *Reversed.*

William S. Cochrane, Charles R. Pollard and John H. Gould, for appellant.

William A. Roach and Robert C. Pollard, for appellees.

GILLETT, J.—November 7, 1905, relator Jett and one Julius were opposing candidates for the office of councilman in the first ward of the city of Delphi. They were the only candidates for said office, and each received sixty-four votes. The board of canvassers declared, and certified to the city clerk, that no person was elected to said office, and said clerk, in turn, certified said fact to the common council. Relators, voters in said ward, after a demand and a refusal, brought this action to compel the calling of a special election to elect a councilman in said ward. The court below sustained a demurrer to the petition and alternative writ, and from the judgment which followed relators appeal.

It is the contention of appellees' counsel that there is no law authorizing the calling of a special election to elect a municipal officer where there has been a failure to elect by reason of a tie vote, and they further contend that it was the duty of the common council to await the expiration of the terms of the councilmen in office and then to appoint a councilman to represent said ward. It is claimed that section forty-five of the act concerning municipal corpora-

tions, approved March 6, 1905 (Acts 1905, p. 219, §3469 Burns 1905), authorized the making of an appointment in such circumstances. The portion of said section which appellees rely on reads as follows: "In case of a vacancy in the office of councilman, from death, resignation or other cause, the common council shall fill such vacancy at a special meeting, to be held at a time not less than ten nor more than fifteen days after such vacancy is discovered by such council; of which special meeting notice shall be given by the clerk as herein required when the council is to fill a vacancy in the office of mayor."

Taking up appellees' contentions in their order, we proceed to examine the legislation which was in force at the time of the adoption of said act. It was provided

1. by section twelve of the general law concerning cities which was passed in 1867 (§3480 Burns 1901, §3047 R. S. 1881), that "should two or more persons have an equal and the highest number of votes for the same office, such board of inspectors shall certify the fact to the trustees or common council, as the case may be, who shall immediately give notice, as in other elections, for a new election, specifying the office to be filled thereby and the ward, if a councilman, in which the poll is to be opened." It was provided by section sixteen of said act (§3483 Burns 1901, §3050 R. S. 1881) that all vacancies in the office of mayor, city judge, clerk or councilmen should be filled by special election. The latter provision was changed, as to vacancies in the office of mayor, clerk and councilmen, by section one of the act of February 26, 1891 (Acts 1891, p. 33, §3484 Burns 1901), but, as we shall show hereafter, in discussing the meaning of the term "vacancy" as applied to a public office, the statute last mentioned in nowise affected the provision of section twelve above quoted. On the contrary, said provision was in full force when said act of 1905 was passed.

Turning to the general act concerning elections, approved April 21, 1881 (Acts 1881 [s. s.], p. 482), which also applies to cities, we find it provided by section

2. fifty-three thereof (§6286 Burns 1901, §4731 R. S. 1881), that "a special election shall be held in the following cases: * * * Third. Whenever two or more persons receiving votes at any election shall have the highest and an equal number of votes for the same office." This act also was in force at the time of the adoption of the act of 1905, *supra*, concerning municipal corporations.

In addition, it is to be observed that two days before 3. the last-mentioned act was approved, a further act concerning elections became a law, wherein it was provided (Acts 1905, p. 189, §6, §6275 Burns 1905): "If two or more persons shall have the highest and equal number of votes for a single office to be filled by the voters of such county or city, such county or city board shall declare that no person is elected to fill such office, and shall certify the same in the statement above provided and when filed the clerk shall certify the fact to the tribunal whose duty it is to supply the vacancies in such office, or to issue writ of election to fill the same as the case may require." While it may be granted that the legislature was in error in assuming that there was any city office which could be filled by appointment in case of a tie vote, yet it is perfectly clear that at the time of the enactment of said section, both under the municipal act of 1867, *supra*, and the general election law of 1881, *supra*, it was the imperative duty of a common council to call a special election to elect a member thereof where there had been a failure to elect by reason of a tie vote. So that when section six, *supra*, of the act of March 4, 1905, went into force, a failure to elect, by reason of a tie vote, created a situation in which, to paraphrase the language of said section, the case required the issuing of a writ of election. We do not, however, attach so much importance to said section as creating a substantive duty as we

do to the fact that, as a statute which gives affirmative recognition to the existence of earlier provisions concerning the calling of special elections in such cases, and which in effect provides for the continued operation of such laws, it is to be reckoned with in determining whether all traces of the prior legislation were obliterated by the act concerning municipal corporations which became a law two days thereafter.

The language of the repealing clause of said last-mentioned act, so far as pertinent to this case, is as follows:

“All former laws within the purview of this act

4. except laws not inconsistent herewith and enacted at the present session of the General Assembly, are hereby repealed.” Dealing with said repealing clause, and not with the general doctrine of repeals by implication, we think it may be said that said act did not necessarily repeal all prior legislation that may have had some relation to cities and towns. In *State v. Reynolds* (1886), 108 Ind. 353, 358, this court quoted with apparent approval the following language, found in *Payne v. Conner* (1813), 3 Bibb (Ky.) 180: “The meaning usually attached to this term (purview) by writers on law, seems to be the enacting

part of a statute, in contradistinction to the preamble; and we think the provision of the act repealing all acts or parts of acts coming within its purview, should be understood as repealing all acts in relation to all cases which are provided for by the repealing act; and that the provisions of no act are thereby repealed in relation to cases not provided for by it.” And see, also, 7 Words and Phrases, title “Purview;” 1 Lewis’s Sutherland, Stat. Constr. (2d ed.), §246.

We have been unable to find any mention of the subject of tie votes in the act of March 6, 1905, *supra*, aside from a provision which is found in section fifteen, but

6. that section relates to towns. It therefore becomes material to inquire whether the provision of section

forty-five, which we have quoted, was designed to prescribe the rule of action for the filling of the office. The provision referred to has to do with "a vacancy" in the office of councilman. An election which is held in advance of the expiration of the term of an incumbent of an office is not an election to fill a vacancy. 1 Dillon, Mun. Corp. (4th ed.), §222. Assuming, without deciding, that the two councilmen representing the first ward of the city of

Delphi would not hold over until a councilman

7. should be elected and qualified who should alone be entitled to represent said ward; or, in other words, assuming that the present law created a new office, and that the former offices of members of the common council from said ward would expire by limitation, so that an efflux of time would eventually work a vacancy, yet the fact that such a condition of affairs as this might occur at the first election held under the new law is not persuasive that it was the intention of the lawmakers to provide for the event of a tie vote at the first election by authorizing an appointment to fill vacancies, if under the act the effect of tie votes hereafter occurring would not be to cause a vacancy by the expiration of the term of the incumbent of the office.

The language of §3, article 15, of the Constitution of this State is very broad. It ordains that, "whenever it is provided in this Constitution, or in any law which

8. *may be hereafter passed, that any officer*, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified." (Our italics.) While it is settled by the decisions of this court that some of the provisions of the Constitution relate solely to the state government, yet, under language as broad as this, referring to any officer who holds office under any law passed after the adoption of the Constitution, it is clear that the reference is broad enough to include municipi-

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pal officers, and it is our opinion that the provision does extend to them. The section in question has been applied to statutory, elective officers (*State, ex rel., v. Berg* [1875], 50 Ind. 496; *State, ex rel., v. Bogard* [1891], 128 Ind. 480; *State, ex rel., v. Menaugh* [1898], 151 Ind. 260, 43 L. R. A. 408), to an officer elected by the General Assembly (*State, ex rel., v. Harrison* [1888], 113 Ind. 434, 3 Am. St. 663), and to a member of the board of trustees of a school town (*Koerner v. State, ex rel.* [1897], 148 Ind. 158). It was declared in the case last cited that, "it is settled that all officers except members of the legislature hold their offices under the Constitution for the term for which they are elected, and until their successors are elected and qualified." It was said in *State, ex rel., v. Harrison, supra*, that the policy of such provisions "is to prevent the happening of vacancies in office, except by death, resignation, removal and the like. They rest upon the assumption that the wiser and more prudent course is, in case the electoral body fails to discharge its functions, to authorize the incumbent to hold over until the succeeding election, rather than that a vacancy should occur to be filled by the appointing power."

The constitution of Missouri (Art. 14, §5) contains a section which reads as follows: "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified." In *State, ex rel., v. Lund* (1901), 167 Mo. 228, 239, 66 S. W. 1062, 67 S. W. 572, the supreme court of Missouri said of this section: "Plaintiff contends that this provision of the constitution does not apply to municipalities, but we are unable to concur in this view, for the following reasons: First, it is broad and comprehensive enough in its terms to include all officers, whether they be state, county, township or municipal, and there is nothing in it which is in-

dicative of anything to the contrary, or which leaves any doubt as to its true meaning. Second, if there existed a doubt as to whether or not it embraces municipalities, that doubt can but be dispelled, when that section is taken into consideration with the various provisions of the constitution which in some way have reference to municipalities." In the course of the opinion from which we have just quoted, the court referred to the holding in *State, ex rel.*, v. *Harrison, supra*, and, in that connection, after setting out the provision of the Indiana Constitution which we are considering, said on page 230: "It is perfectly apparent from that provision of the Constitution that there was no escape from the conclusion reached by the court, that is, that all officers in that state hold over after the expiration of their terms until their successors are elected, or appointed, as the case may be, and are qualified."

After the expiration of the term fixed by the General Assembly, the tenure, or title, of the officer is not under or by virtue of legislative authority, but by the continuing and superior authority of the Constitution.

State, ex rel., v. *Harrison, supra*; *Koerner v. State, ex rel.*, *supra*; *State, ex rel.*, v. *Menaugh, supra*. The effect of the constitutional provision is to add "an additional, contingent and defeasible term to the original fixed term, and excludes the possibility of a vacancy, and consequently, the power of appointment, except in case of death, resignation, ineligibility, or the like." *State, ex rel.*, v. *Harrison, supra*.

The act of March 6, 1905, *supra*, was designed as a more or less permanent expression of the will of the legislature, and assuming, as we must, that it was cognizant

10. of the fundamental law in the enactment of the statute, it becomes apparent that in making provision for the filling of vacancies in the office of councilman there was no intent to treat the failure to elect as resulting in a vacancy. *State, ex rel.*, v. *Bogard* (1891), 128 Ind. 480.

This being true, we should be loath to conclude, in the absence of language requiring it, that it was the purpose in the enactment of said statute to blot out all provision for the filling by election of an office, elective by the people, where the regular election had resulted in a tie vote.

Although it is probable that the act in question operates to repeal by implication many prior provisions of statutes relative to cities and towns, yet we cannot consent

11. to the view that it is to be treated as a thing apart from all the legislation of the State. In *Humphries v. Davis* (1885), 100 Ind. 274, 50 Am. Rep. 788, it was said: "A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look to other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. * * * Statutes are to be so construed as to make the law one uniform system, not a collection of diverse and disjointed fragments."

The presumption against a repeal by implication is strong, and where two acts, which apparently supplement each other, are passed at the same session of the

12. legislature, they are to be treated, in the absence of any indication to the contrary, as if they together constituted but one law. Potter's Dwarrris, Statutes, 189. But in this case there appears an affirmative intent in the municipal act to uphold all consistent statutes

13. passed at the same session, and this would seem, in view of section six of the election law of 1905,

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supra, to leave legislation on the subject of the votes in city elections as it stood before, and, besides, section forty-three of the act concerning cities and towns provides that all city elections shall be held in conformity with the general election laws of the State.

There can be no doubt of the duty of appellees to call a special election. We are of opinion that the court

14. below erred in sustaining the demurrer to the petition and alternative writ.

Judgment reversed, with a direction to overrule said demurrer, and for further proceedings not inconsistent with this opinion.

TAYLOR v. STRAYER ET AL.

[No. 20,694. Filed June 20, 1906.]

1. DRAINS.—*Right to Construct.*—*Legislative Discretion.*—There is no common-law right to construct a drain over another's land, and a sanction so to do, given by the legislature, may be withdrawn at the discretion of the legislature. p. 27.
2. CONSTITUTIONAL LAW.—*Police Power.*—*Statutes.*—*Power of Legislature to Repeal.*—The legislature may repeal or amend any statute relating to the public health or general welfare. p. 28.
3. STATUTES.—*Repeal.*—*Saving Clause.*—*Pending Actions.*—The repeal, without a saving clause, of a statute giving a right of action takes away all rights under such statute except those embodied in a final judgment. p. 28.
4. DRAINS. — *Lakes.* — *Statutes.* — *Repeal.* — *Saving Clause.*—The repealing clause of the act of 1905 (Acts 1905, pp. 456, 480, §14), providing: "Such repeal shall not affect any pending proceedings in which a ditch has been ordered established," does not save an action pending on appeal in the circuit court, though the board of commissioners had rendered a judgment establishing such drain. p. 28.
5. APPEAL AND ERROR.—*Judgment Appealed From.*—*Legal Effect.*—An order or judgment which is vacated by an appeal is, in legal effect, no order or judgment. p. 29.

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6. JUDGMENT.—*Final.*—*Legislative Power to Annul.*—A final judgment, rendered in an action based upon a purely statutory right, cannot be arbitrarily set aside or annulled by the legislature. p. 29.
7. TRIAL.—*Issues.*—*Boards of Commissioners.*—*Appeal and Error.*—Ordinarily, on an appeal from the board of commissioners, only the issues raised before such board may be litigated in the circuit court. p. 29.
8. JUDGMENT.—*Final.*—*Drains.*—*Board of Commissioners.*—*Appeal.*—Where an appeal is taken from an order of the board of commissioners in a ditch proceeding, the establishment, if at all, of such ditch must be by order of the circuit court, either directly or by remanding the cause with directions to such board. p. 29.
9. DRAINS.—*Statutes.*—*Repeal.*—*Saving Clause.*—The repealing clause of the act of 1905 (Acts 1905, pp. 456, 480, §14), providing: "Such repeal shall not affect any pending proceedings * * * in which there is no attempt to and which will not lower or affect any lake" covering ten acres, saves all pending ditch proceedings, except those draining such lakes, and they may be prosecuted to final judgment regardless of such act. p. 30.
10. STATUTES.—*Repeal.*—*Penalties.*—*Forfeitures.*—*Drains.*—Section 248 Burns 1901, §248 R. S. 1881, providing: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide," refers only to penalties, forfeitures and kindred liabilities, and not to the establishment of drains. p. 30.
11. SAME.—*Repeal.*—*Saving Statutes.*—Section 243 Burns 1901, §243 R. S. 1881, providing that no suits instituted under existing laws shall be affected by the repeal thereof, referred primarily to the laws of 1852, and the repealing clause of the act of 1905 (Acts 1905, pp. 456, 480, §14) is not controlled thereby. p. 30.
12. COSTS.—*Right of.*—*Drains.*—*Statutes.*—*Withdrawing Right of Action.*—Where the statute granting a right to establish a certain kind of public drain is repealed without any saving clause as to the costs thereof, such costs fall, as at the common law, upon the parties making same. p. 31.
13. TRIAL.—*Issues.*—*Drains.*—*Appeal from Board.*—*Jurisdiction.*—*Statutes.*—A plea to the jurisdiction, founded upon a statute passed subsequently to an appeal from the board of commis-

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sioners in a drainage proceeding, should be entertained by the circuit court, though ordinarily only such issues may be litigated in the circuit court as were presented to such board. p. 31.

From Noble Circuit Court; *Edwin C. Vaughn*, Special Judge.

Proceedings by John N. Strayer and others to establish a drain, against which Henry L. Taylor remonstrates. From an order establishing said drain, remonstrant appeals. *Reversed.*

John W. Hanan, Thomas R. Marshall and William L. Taylor, for appellant.

T. A. Redmond and L. H. Wrigley, for appellees.

MONTGOMERY, J.—Appellees commenced this proceeding by filing a petition with the Board of Commissioners of the county of Noble, for the establishment of a ditch beginning in said county and terminating in Lagrange county, by virtue of the provisions of §§5655-5671 Burns 1901. Appellant, at the proper time, filed a remonstrance against the proposed ditch, and such proceedings were thereupon had as resulted in a judgment of the circuit court upon appeal dismissing the proceeding. This judgment was reversed upon appeal to this court. *Strayer v. Taylor* (1904), 163 Ind. 230. The cause was remanded to the lower court, and before further steps were taken therein the General Assembly passed a new drainage law and repealed all prior drainage statutes. Acts 1905, p. 456, §5622 *et seq.* Burns 1905. Section fourteen of the new act reads as follows: "All laws and parts of laws heretofore enacted in relation to drainage are hereby repealed, but such repeal shall not affect any pending proceedings in which a ditch has been ordered established or in which there is no attempt to and which will not lower or affect any lake or body of water that has to exceed ten acres of surface at high-water mark, and such proceedings and all remedies in relation thereto shall be concluded and

be effective in all respects as if this act had not been passed. Nor shall this act be construed to repeal any act passed at this session of the General Assembly in relation to the construction of drains and sewers in counties having a city therein of not less than fifty-nine thousand nor more than one hundred thousand population according to the last preceding United States census, nor shall this act be deemed to repeal or affect any act passed at this session of the General Assembly to preserve the fresh-water lakes of the State of Indiana at their established level and to protect them from danger of being injuriously affected or destroyed: Provided, further, that such repeal shall not affect or be construed to repeal any other act upon the subject of drainage passed by the present General Assembly."

The same legislature passed a penal statute for the preservation of fresh-water lakes, section one of which reads as follows: "That it shall be unlawful for any person or persons, firm or corporation, to locate, dig, make, dredge, or in any manner construct, or for any court, or board of commissioners, or body of viewers or drainage commissioners, to order or recommend the location, establishment or construction of any ditch or drain cutting into or through, or upon the line of any fresh-water lake or lakes in the State of Indiana, or to locate, dig, make, dredge or in any way construct any ditch or drain, having a bottom depth lower than the present water line of such lake, within forty rods of any point on the line of such lake where the line or any portion thereof is known or ascertainable; or in case such line or any part thereof is lost and cannot be ascertained, within forty rods from high-water mark on the margin of such lake, such high-water mark to be the highest point on such margin to which such water has risen within the ten years last past." Acts 1905, p. 447, §5644 Burns 1905.

Other sections of the act made it unlawful so to interfere with the shores or banks of any such lakes as to lower the

waters thereof, or to interfere with any levee or dam constructed for the purpose of maintaining the present water level of any such lake.

After the taking effect of these statutes appellant filed a special, verified answer or plea to the jurisdiction of the court, in which he alleged that the proposed ditch will pass through the following fresh-water lakes in Noble county, to wit: Lake Shockopee, Hardy lake, Tamarack lake, and Mud lake, and also Nauvoo lake in Lagrange county; that it will lower the present level of said lakes eight feet in depth; that appellant is the owner of a dam by which the present water level of said lakes is maintained, and that the construction of the proposed drain will destroy said dam and thereby lower the water level of said lakes eight feet; that by the construction of the proposed drainage the banks and shores of said lakes will be so cut into and interfered with as to lower the water level of said lakes; that the waters of said lakes cover areas as follows: Shockopee, 120 acres; Hardy, 70 acres; Tamarack, 130 acres; Mud, 5 acres, and Nauvoo, 80 acres; that under the drainage act of 1905, *supra*, the rights of appellees were not preserved, but the proceedings contemplated under their petition were expressly forbidden and made unlawful, and the court is without authority further to entertain jurisdiction of the proceeding. Wherefore the court was asked to hear evidence as to the facts alleged, and to make such order as under existing laws the proof might warrant.

Appellees' demurrer to this answer for want of facts was sustained, to which decision appellant excepted. Error assigned upon this ruling presents the controlling question for decision.

No right to construct an artificial drain over the lands of others exists at common law. Drainage statutes are given or withheld in the discretion of the legisla-

1. ture, and when enacted may be modified or repealed at the pleasure of that body. It follows that one

legislature cannot determine the policy of its successor and forestall action which may be deemed expedient to

2. protect the public health or to promote the public welfare. It is altogether plain that in the opinion of the General Assembly of 1905, the public interests require the preservation of fresh-water lakes having to exceed ten acres of surface. The drainage act of 1905, *supra*, expressly repealed all existing laws upon that subject. It is a well-settled principle that when a

3. right of action, not existing at common law, is given by statute, a repeal of the statute without saving pending actions takes away the right of action in pending causes, which have not proceeded to final judgment. *Hunt v. Jennings* (1839); 5 Blackf. 195, 33 Am. Dec. 465; *Moor v. Seaton* (1869), 31 Ind. 11; *Roush v. Morrison* (1874), 47 Ind. 414; *Board, etc., v. Ruckman* (1877), 57 Ind. 96; *Rupert v. Martz* (1888), 116 Ind. 72.

A very eminent authority states the rule as follows: "The effect of a repealing statute, I take to be to obliterate the statute repealed as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law." Sedgwick, Stat. and Const. Law (2d ed.), 108.

In the case of *Hunt v. Jennings, supra*, Justice Blackford states the principle in the following words: "Whenever a statute from which a court derives its jurisdiction in particular cases is repealed, the court cannot proceed under the repealed statute even in suits pending at the time of the repeal, unless they are saved by a clause in the repealing statute."

This proceeding was accordingly terminated with the repeal of the statutes under which it was established unless it falls within the saving provisions of section four-

4. teen above set out. It is provided that the repeal "shall not affect any pending proceeding in which

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a ditch has been ordered established or in which there is no attempt to and which will not lower or affect any lake or body of water that has to exceed ten acres of surface at high-water mark." It is insisted by appellees' counsel that the proposed ditch, having been ordered established by the Board of Commissioners of the County of Noble, comes within the first of said saving clauses. We cannot agree with this contention. An order or judgment which

5. has been vacated by an appeal is in legal contemplation no order, and the statute without doubt means that only such proceedings shall be saved under this clause as have proceeded to a final order or judgment for the establishment of the ditch, and in which nothing remains but the execution of such judgment. A final judgment recovered in the courts, vests the owner there-

6. of with such interests as cannot be arbitrarily taken away, and it was entirely appropriate for the legislature to disclaim any intention to disturb such rights, and to remove all question as to the right to proceed with the construction of ditches so established and the collection of assessments made therefor. It is shown by the record that an appeal was properly taken from the order of the board of commissioners establishing the ditch in controversy, to the Noble Circuit Court. This appeal effectually vacated the judgment of the board of commissioners. It is true that ordinarily only such issues may be tried upon

7. appeal as were tendered before the board, and it may be that the more important questions in this case have been finally disposed of before the board; yet it is by the judgment of the circuit court that this proposed ditch must be established, if it is ever established

8. or constructed. When a final judgment for the construction of a ditch is rendered in the circuit court upon appeal, it may be executed by that court, or it may be certified back to the board for execution according to its terms. §§7864, 7865 Burns 1901, §§5777, 5778 R. S.

1881; *Sharp v. Malia* (1890), 124 Ind. 407; *Bonfoy v. Goar* (1895), 140 Ind. 292; *Head v. Doehleman* (1897), 148 Ind. 145; *Trittipo v. Beaver* (1900), 155 Ind. 652; *Inwood v. Smith* (1901), 156 Ind. 687.

It was also the expressed intent of the legislature to save all pending ditch proceedings which had not progressed to final judgment, provided the proposed ditches were

9. not designed to and would not affect lakes of the surface area named. This saving feature is in accord with the legal principle that where new legislation does not destroy a preëxisting right or deny a remedy for its enforcement, but merely modifies the proceedings, the jurisdiction continues under the forms directed by the later act, so far as the two acts are different. *Pittsburgh, etc., R. Co. v. Oglesby* (1905), 165 Ind. 542, and cases cited.

It is specifically alleged in appellant's answer that the proposed ditch will, if constructed, affect and lower the waters of the fresh-water lakes named, four of which are within the protection of the law. It is clear that the legislative purpose was to prevent and prohibit, under penalties, such action and results; and, taking the facts alleged as true, it is our conclusion that this proceeding, although pending, was not saved by any provisions of the repealing statute.

Appellees' counsel further invoke the saving provisions of §§243, 248 Burns 1901, §§243, 248 R. S. 1881. It

is manifest that §248, *supra*, has no application to

10. any feature of this case, but only relates to penalties, forfeitures and kindred liabilities.

Section 243, *supra*, constituted section two of an act of 1852, which was passed primarily to preserve rights vested and suits instituted under laws repealed by the leg-

11. islature of 1852. In the revision of the statutes of 1881, similar provisions relating to existing rights of action and pending proceedings were enacted. Acts 1881, pp. 240, 389. In the exercise of the sovereign

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power of the State, it was the prerogative of the legislature of 1905 to embody the policy of the State in such drainage laws as met its approval, and to repeal existing laws upon that subject, unhampered by any of the statutes mentioned.

Costs are given or withheld by statute, and the right to recover costs not already reduced to judgment must cease with the extinguishment of the right of action to

12. which they are incident. It was clearly within the power of the legislature to change the laws and prohibit the drainage of lakes, even though such change of policy and prohibitory legislation result in individual inconvenience, hardship and loss. *State v. Richcreek* (1906), *post*, 217; *Chicago, etc., R. Co. v. People, ex rel.* (1906), 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596.

The law upon which the answer under consideration was based was enacted subsequently to the appeal from the board of commissioners, and it was proper for the

13. circuit court to permit the filing of such answer, after the time when ordinarily the issues would have been finally closed. The facts averred therein are sufficient to bar the further prosecution of the proceeding, and the court erred in sustaining appellees' demurrer to the same.

The judgment is reversed, with directions to overrule appellees' demurrer to appellant's verified paragraph of answer, and for further proceedings in harmony with this opinion.

 QUICK V. PARRATT, TRUSTEE, ET AL.

[No. 20,843. Filed June 20, 1906.]

1. DRAINS. — *Cleaning.—Allotments.—Statutes.*—Under §§5633, 5637 Burns 1901, Acts 1889, p. 53, §2, and Acts 1893, p. 271, it is the duty of landowners, after an allotment of their portions of a drain, to clean out and keep in repair their respective allotments. p. 34.

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2. **DRAINS.—Repairs.—Trustee's Duties.**—Under §5638 Burns 1901, Acts 1891, p. 47, §2, in case the landowner fails to clean or keep in repair his allotment of a drain, the proper township trustee, after notice and failure of such landowner to comply, shall have such work done at such landowner's expense, such expense to be placed on the tax duplicates or collected by suit by such trustee. p. 34.
3. **SAME.—Repairs.—Cost of.—Collection.—Townships.—Trustees.**—Under §5638 Burns 1901, Acts 1891, p. 47, §2, the proper landowner alone is liable for the cost of cleaning or keeping in repair his allotment of a public drain; and an action cannot be maintained against the township therefor, though the trustee thereof ordered the work done and gave an official certificate therefor. p. 35.

From Pulaski Circuit Court; *John C. Nye*, Judge.

Action by William M. Quick against John Parratt, as trustee of Rich Grove township, and another. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed*.

Spangler & Son and *Robbins & Pentecost*, for appellant.
W. W. Borders, for appellees.

JORDAN, C. J.—Appellant sued John Parratt, trustee of Rich Grove township, Pulaski county, Indiana, together with said Rich Grove township, to recover a money judgment. The complaint alleges the following facts: John Parratt, as trustee of Rich Grove township, Pulaski county, Indiana, in the year 1902, employed George Turner to clean out allotment No. 13, of a public ditch, known as the "Ender ditch," situated in said township. Turner, under and in pursuance of the contract of employment, cleaned out the ditch allotment, for which labor he was to be paid \$90 out of the funds of said Rich Grove township. Upon completion of the work the trustee issued to him the following certificate, which was filed with and made a part of the complaint:

"State of Indiana, }
Pulaski County. } ss.

I, John Parratt, trustee of Rich Grove township, in said county and State aforesaid, do hereby certify that George Turner, by my direction as said trustee, has done labor in cleaning out allotment No. 13 in the Ender ditch, assessed to the south half of the northwest quarter and northeast quarter of the southwest quarter of section thirty-one, township thirty-one north, range three west, in Pulaski county, Indiana, in the name of W. G. and Levi Ender, to the amount of \$90, and he is entitled to receive said sum out of the township funds of said township as soon as the assessment now on file in the auditor's office against said land above described is paid. Dated December 12, 1902.

John Parratt,

Trustee of Rich Grove Township."

On July 18, 1903, Turner, for a valuable consideration, assigned in writing this certificate to appellant, who, at and prior to the commencement of this action, was the *bona fide* holder thereof. No part of the \$90 has been paid, and the township trustee has refused to pay the same, or any part thereof, and has wholly failed to collect the assessment for the allotment.

Appellee Parratt, the trustee, appeared to the action and filed a motion to dismiss the same, so far as he was concerned, assigning as a reason therefor that he was not the proper party, either in his individual or official capacity. This motion, as the record recites, was sustained. Rich Grove township demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. Its demurrer was sustained, and on the appellant's refusal to plead further judgment was rendered against him for cost.

Section 5633 Burns 1901, Acts 1889, p. 53, §2, authorizes the county surveyor to allot portions of a public ditch

to landowners, corporations, etc., assessed for the

1. construction thereof, for the purpose of cleaning out and keeping such improvements in repair. Section 5637 Burns 1901, Acts 1893, p. 271, imposes it as a duty upon such landowners, etc., after the allotments have been made, to clean out and repair the respective parts of the ditch allotted to them, between August 1 and November 1 of each year.

Section 5638 Burns 1901, Acts 1891, p. 47, §2, expressly provides that it shall be the duty of every person or corporation to whom an allotment of a public

2. ditch has been made, upon receipt of the notice from the township trustee, as therein provided, "to perform his allotment within the time fixed in said notice, and on failure so to do, the trustee shall proceed at once to have the same completed and shall certify the cost thereon, including his own per diem, to the auditor of the county, who shall place the same on the tax duplicate as other taxes against such person or corporation, and to be collected as other taxes are collected, and when collected, the same to be paid over to such trustee, or such trustee may recover such expense and his fees before any justice of the peace of the township where the owner resides, or through or into which such road or railroad runs; or he may bring suit in the circuit or superior court of the county to collect such expense and fees, and enforce and foreclose the lien on such land or upon such road or railroad, and in all suits brought by the trustee under the provisions of this act, such trustee shall also recover reasonable attorney fees, and the judgment shall be without relief from valuation or appraisal laws."

It will be observed that under the provisions of this statute it is made the duty of the proper township trustee, upon the failure of the landowner to perform the work allotted to him, at once to proceed to have the same completed. Said official is thereby authorized to employ some

person to perform the work, and on the completion thereof he is required to certify the cost or expense of the work performed, including his own per diem, to the auditor of the county, to be by the latter official placed on the tax duplicate, as other taxes against such person or corporation, and to be collected in like manner as other taxes, and when collected the money is to be paid over to such township trustee. Instead of leaving the collection of the cost and expenses, as above provided, in the hands of the proper tax officials, the trustee may institute an action before a justice of the peace to recover a personal judgment against the landowner, or he may prosecute a suit in the circuit or superior court for a collection of the money by a foreclosure of the lien, provided the necessary antecedent steps have been taken to create a lien upon the land. *Beatty v. Pruden* (1895), 13 Ind. App. 507; *Hoch v. Monroe Tp.* (1895), 12 Ind. App. 595.

An examination of the statute makes it plain that it is only the person, natural or artificial as the case may be, to whom an allotment has been made that becomes

3. liable for the cost and expenses arising out of the work of performing the allotment under the contract of employment made by the township trustee. There is no law, either written or unwritten, which in any manner renders the township or its trustee, as such official, liable for the work performed by the person in cleaning out or repairing any allotment of a public ditch under a contract of employment made by the trustee in pursuance of the above statute.

It is manifest that the complaint under the facts therein alleged does not state a right of action against the township, and the demurrer of the latter thereto was properly sustained.

Judgment affirmed.

LITTLER ET AL. v. FRIEND.

[20,834. Filed June 21, 1906.]

1. **LIENS.—Laborers.—Foreclosure.—New Trial.—Evidence.—Sufficiency.**—Where the evidence shows that plaintiff was employed by the Matthews Drilling Company to assist in sinking a gas-and-oil well; that defendant Huffman told him to file a lien for his services; that he filed such lien against the land containing such well; that defendant Littler was the owner of the land, and that he had leased the gas-and-oil privileges to Walley, who had assigned same to the Consumers Gas Trust Company, a personal judgment against Littler and Huffman and a decree of foreclosure against Littler are not sustained by the evidence. p. 38.
2. **SAME.—Laborers.—Foreclosure.—Leases.—Decree.**—A laborer, employed by the lessee of lands to explore for gas and oil, is entitled to a laborer's lien only as against such lessee's interest in such lands. p. 41.
3. **SAME.—Contracts.—Express.—Implied.—Mechanics' and laborers' liens rest upon contract, express or implied; and to support the same the evidence must show a contract with the owner of the interest against which the lien is sought to be enforced.** p. 41.

From Wells Circuit Court; *Edwin C. Vaughn*, Judge.

Suit by William D. Friend against Joseph W. Littler and others. From a decree for plaintiff, defendants Littler and another appeal. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

Dailey, Simmons & Dailey, for appellants.

A. R. Long, W. H. Eichhorn and *G. A. Matlack*, for appellee.

JORDAN, C. J.—Appellee, as plaintiff below, commenced this action in the Grant Circuit Court against the Matthews Drilling Company, George N. Catterson, Joseph W. Littler and William H. Huffman to enforce a mechanic's lien under §7255 Burns 1901, Acts 1899, p. 569, for work and labor performed by him in and about the construction of a

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certain gas-and-oil well situated upon the lands described in the complaint. The complaint alleges that on January 14, 1904, the defendant Joseph W. Littler was, and still is, the owner in fee simple of the southeast quarter of section twenty-eight, township twenty-three north, range nine east, in Grant county, Indiana. It is further averred therein that on said day the defendant William H. Huffman, operating under an oil-and-gas lease from said landowner Joseph W. Littler, contracted with the defendants the Matthews Drilling Company and George N. Catterson to drill a gas-and-oil well on said described land. On the aforesaid day the plaintiff and the defendant Catterson entered into a contract by which the plaintiff was employed to work on said well for \$4.50 per day, which was the reasonable value of his services. The pleading then alleges that the plaintiff continued to work in the construction of the well in question until February 15, 1904, on which date he was discharged by Catterson before the completion of the work which he was performing. The whole amount due and unpaid for his labor or services is \$96.75. The complaint discloses that within sixty days after performing the labor in controversy the plaintiff filed a notice in writing in the office of the recorder of Grant county, Indiana, declaring therein his intention to hold a lien on the aforesaid described premises and also on the drilling machine situated upon said land and on the gas-and-oil well and all pipes, tubing, etc., connected therewith, for the amount due to him for said work. The employment of attorneys is averred, and judgment is demanded for the amount due, principal, interest and attorneys' fees, and for the foreclosure of a mechanic's lien.

The defendants, other than Littler and Huffman, were defaulted and judgment was rendered against them. The venue of the action was changed to the Wells Circuit Court, wherein the cause was tried by the court

upon the issues joined by the separate answers of general denial filed by defendants Littler and Huffman.

On the evidence introduced the court found in favor of plaintiff for \$121.25 and that he was entitled to a foreclosure of the lien involved. Over the separate motions of defendants for a new trial, the court rendered a personal judgment against all of the defendants to the action, and decreed that the lands described in the complaint, together with drilling machine, gas-and-oil wells, and all pipes, tubing and casting connected therewith be sold by the sheriff in like manner as lands and property are sold on an execution at law. The proceeds arising out of said sale were ordered to be applied by the sheriff in payment and satisfaction of the amount due plaintiff, principal, interest and costs. From this judgment defendants Littler and Huffman prosecuted a term-time appeal to the Appellate Court.

The record does not disclose that either of appellants moved for a modification of the above judgment and decree. Each has assigned several alleged errors, but the only question discussed by their counsel and urged for a reversal of the judgment is that the decision of the trial court is not sustained by sufficient evidence and is contrary to law. The record shows that appellee on the trial testified as a witness in his own behalf, and the following is substantially the material facts proved by the evidence.

Appellee was employed by the defendant Matthews Drilling Company on January 14 to work at drilling a gas-and-oil well on what he, in testifying at the

1. trial, denominated the "Littler farm," which he stated was in section twenty-eight, township twenty-three north, range nine east, in Grant county, Indiana. He testified that he worked twenty-two and one-half days at \$4.50 per day; that he commenced his work on the well in question on January 14 and continued his work thereon until February 15, on which day he was discharged. The well upon which he

worked was known as No. 2. He has received nothing on the amount due him for his work. On February 15, the day on which he quit work, he stated that he had a conversation with appellant Huffman, in which he told Huffman that he "looked to him for his money," and that Huffman in reply told him to file a lien. A copy of the lien which was filed in the office of the recorder of Grant county was introduced in evidence. It was agreed between the parties, in the event appellee was entitled to recover, that \$25 would be a reasonable sum to be allowed for attorneys' fees.

A certified copy by the county auditor of certain transfers of real estate was introduced in evidence for the purpose of proving that appellant Joseph W. Littler was the owner of the real estate upon which the gas-and-oil well in controversy was located. A certain contract, or lease, was introduced in evidence. This instrument bears date of October 15, 1896, and was entered into by and between Joseph W. and Sarah E. Littler and William A. Walley, whereby said Littlers sold and assigned to said Walley all of the gas and oil in and under a certain tract of land in Grant county, Indiana, described as the east half of the southeast quarter of section twenty-eight, township twenty-three north, range nine east. The right is therein granted to said Walley to enter upon said land at all times for the purpose of drilling and operating for gas, oil or water, with the right and privilege of doing all and singular that which is necessary for said purpose, etc. This lease appears to have been duly recorded in the recorder's office of Grant county, Indiana. On October 31, 1896, said Walley made the following assignment of said contract, or lease:

"For value received I hereby sell, assign and transfer to the Consumers Gas Trust Company all of my right, title and interest in and to the within lease.

William A. Walley."

This assignment was duly acknowledged before a notary public on October 31, 1896, and was recorded in the

recorder's office of Grant county, Indiana, and was introduced in evidence on the trial. The above was all of the evidence given in the cause.

It is certainly manifest that it is, for several reasons, insufficient to sustain the decision of the trial court. As previously shown, the complaint, after averring that Joseph W. Littler on January 14, 1904, was, and still is, the owner in fee simple of the real estate described, then proceeds to allege that on said date the defendant William H. Huffman, "operating under an oil-and-gas lease from said owner, Joseph W. Littler, contracted with George N. Catterson and the Matthews Drilling Company to drill a gas-and-oil well on the above-described lands;" that on said January 14 George N. Catterson employed the plaintiff at and for the price of \$4.50 per day to work in constructing the aforesaid well. The principal theory of the complaint appears to be to enforce or foreclose a mechanic's lien against the lease-hold interests of Huffman, which the latter acquired in the lands under the lease from the Littlers, but the evidence in the case wholly fails to prove that Huffman owned or had any interest whatever, by lease or otherwise, in the lands or other property upon which it was sought to enforce the lien in controversy.

The evidence shows that Joseph W. and Sarah E. Littler executed the gas-and-oil lease upon these lands to William A. Walley, and that he subsequently assigned and transferred all of his interest, right and title in and to the lands to the Consumers Gas Trust Company, which company, so far as the evidence discloses, is still the owner and holder of said lease under this assignment. There is absolutely no evidence tending to show that Huffman in any manner succeeded to any of the interests or rights under the lease to said premises from the Consumers Gas Trust Company, or any other person; or, in other words, there is an entire absence of any evidence to show that he, at the time he let the contract to Catterson and the Matthews

Drilling Company to drill the well in question, or at any time thereafter, had or held any interest or title to the leased premises or was in any manner operating under the lease executed by the Littlers to Walley.

Again, the evidence does not establish that Huffman either expressly or impliedly employed or in any manner authorized or directed Catterson or the Matthews

2. Drilling Company to construct the well about which appellee was employed by said company, or that Huffman had any knowledge or notice that it was being constructed during the time appellee was employed thereon. If the evidence were sufficient to show that Huffman was the lessee of Littler, the owner of the land, and that he had contracted or directed the drilling or construction of the well, as alleged in the complaint, upon which appellee was employed, the lien that might have been created in the latter's favor so far as the lands in question could thereby be charged, would only extend to and affect the lease-hold interest which Huffman owned or had therein under the lease from the owner. §§7255, 7256 Burns 1901, Acts 1899, p. 569, Acts 1889, p. 257, §2; *McCarty v. Burnet* (1882), 84 Ind. 23, and cases there cited; *Coburn v. Stephens* (1894), 137 Ind. 683, 45 Am. Rep. 218; *Adams v. Buhler* (1888), 116 Ind. 100. And see Phillips, Mechanics' Liens, §§65, 83, 84, 112, 191, 305, 306.

In *Adams v. Buhler*, *supra*, this court, in considering the mechanic's lien therein involved, said: "Mechanics' liens rest upon contract, express or implied, with

3. the owner or other person whose interest in the real estate it is proposed to bind or affect by the lien, and while persons who perform labor or furnish material for a contractor may secure a lien upon the real estate or building, by notifying the owner and taking the other necessary steps, it is nevertheless essential to the sufficiency of a complaint to foreclose such a lien that it should appear

therein who owned the real estate, or the interest to be affected, at the time the building was erected, and that it was erected in pursuance of a contract, express or implied, with such owner. *Lawton v. Case* [1880], 73 Ind. 60; *Neeley v. Searight* [1888], 113 Ind. 316; *City of Crawfordsville v. Brundage* [1877], 57 Ind. 262.”

It cannot be asserted that the complaint under the facts therein alleged seeks to secure, in addition to a foreclosure of the lien, a personal judgment against either of appellants herein. The evidence is so clearly insufficient to establish the right of appellee either to a personal judgment or a decree foreclosing the lien in controversy as against appellants that nothing in reason can be said to the contrary.

For the insufficiency of the evidence the judgment of the lower court, so far as it affects appellants, or either of them, is in all things reversed, and the cause is remanded with instructions to grant each of the appellants a new trial, and for further proceedings not inconsistent with this opinion.

CITY OF COVINGTON v. FERGUSON.

[No. 20,878. Filed June 21, 1906.]

1. **MORTGAGES.**—*Foreclosure.—Quieting Title.*—A complaint for foreclosure of a mortgage alleging that defendant claims and asserts a reversionary interest without right in the mortgaged premises, and that if such defendant has any title thereto, it is inferior to the mortgage lien, and praying a sale “free from all claims of defendant,” the answer thereto being a general denial, properly puts in issue defendant’s title to such lands. p. 45.
2. **PARTIES.**—*Mortgages.—Foreclosure.*—Under §269 Burns 1901, §268 R. S. 1881, any party claiming title adversely to plaintiff, or who is necessary to a complete determination of the questions involved, may be made a defendant in a foreclosure suit. p. 46.
3. **QUIETING TITLE.**—*Answer in Denial.—Sustaining Demurrer to Subsequent Answer.*—It is not error to sustain a demurrer to

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a second paragraph of answer of title in a foreclosure suit where the title is in issue, when the general denial is already pleaded, all defenses being admissible thereunder. p. 47.

4. PLEADING. — *Answers.—Demurrer.—Subsequent Withdrawal.*—The subsequent withdrawal of a paragraph of answer will not render erroneous a ruling on demurrer to another paragraph of answer, where such ruling was not erroneous when made. p. 47.
5. TRIAL. — *Issues.—Answers.—Cross-Complaint.*—Where cross-complaints contained the same facts alleged in answers, sustaining a demurrer to such answers was harmless, since the facts were provable under the cross-complaints. p. 47.

From Fountain Circuit Court; *Joseph M. Rabb*, Judge.

Suit by David S. Ferguson against the City of Covington and others. From a decree for plaintiff, defendant city appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

Oliver S. Jones, A. T. Livengood and Oliver P. Lewis, for appellant.

Lucas Nebeker and V. E. Livengood, for appellee.

GILLET, J.—This suit was instituted by appellee against appellant and others to foreclose a real estate mortgage, executed by the Fountain, Warren & Vermillion Agricultural Association. The allegations of the complaint as to appellant are as follows: "Plaintiff further avers that the city of Covington, defendant herein, a municipal corporation in and under the laws of Indiana, claims and pretends to have and own a contingent estate in fee simple, dependent upon the condition that should said corporation, for any cause whatever, cease to exist, or should fail to take all proper care of said grounds, pay all taxes thereon, and keep the same properly and securely fenced, and strictly applied for the purposes for which said corporation was organized, for the period of five years, then said real estate to revert to said town, now city, of Covington, for a public park, commons or fair-ground, but plaintiff denies that said defendant has any contingent or other right, title or

interest whatever in any of such land. Plaintiff avers that if said defendant has, or shall be found or held to have, any title, right or estate, the same is subject to the lien of said mortgage, and said mortgage is paramount thereto, and that the same was duly conveyed and mortgaged to plaintiff, by virtue of the powers conferred therefor on said association by the deeds aforesaid, and by the law in force at the time of the execution of said mortgage." The relief sought by said complaint is the foreclosure of the mortgage and a sale of the mortgaged premises, "free from all claims of the defendants or any of them," for the purpose of raising and paying the plaintiff's debts. Defendant city unsuccessfully demurred to the complaint, and afterwards filed answer in three paragraphs, the first of which was a general denial. It then filed a cross-complaint in two paragraphs, and with this pleading there was filed what was denominated a fourth paragraph of answer by way of cross-complaint, which, for the sake of convenience, we shall hereafter denominate as a fourth paragraph of answer. The third paragraph of answer was directed to so much of the complaint as sought a foreclosure upon a particular fifteen-acre tract, and, in substance, the defense therein asserted was that said association deraigned its title from a deed, which was specially pleaded, and under which said city claimed that it was entitled to said real estate by virtue of a provision therein, which it is claimed amounted to a limitation. The first and second paragraphs of cross-complaint were ordinary paragraphs to quiet title as to the whole real estate against which a foreclosure was sought, and what we have denominated the fourth paragraph of answer set up substantially the same facts as are contained in the third paragraph of answer. Plaintiff filed a general denial to the cross-complaint, and demurred, for want of facts, to the second and third paragraphs of answer. The demurrer was sustained, to which ruling said city reserved a several exception. It then appears that the city withdrew its

fourth paragraph of answer, and refused and declined to amend the first and second paragraphs of answer, or to plead further to the plaintiff's complaint, but elected to stand by and upon its said answers. The cause was submitted, and, after hearing the evidence, the court entered a finding, that all of the allegations of the complaint were true, and it further found against the city on its cross-complaint. Upon the findings there was a decree of foreclosure, under which it was ordered that all the right, title, interest and claim of the defendants and each of them be sold for the purpose of raising and paying the amount due, and it was further adjudged that the city take nothing by its cross-complaint. From this decree the city appeals.

The first and second assignments of error, which draw in question the sufficiency of appellee's complaint, stand as waived. The remaining assignment is based on the alleged error of the court in sustaining appellee's demurrer to the third paragraph of appellant's answer.

It does not admit of doubt that under the issues which were formed by the answer in general denial to appellee's complaint the question was presented for adjudica-

1. tion as to whether appellant had any interest in the real estate against which a foreclosure was sought. Appellee sought, by his complaint, as he was entitled to do, to secure a decree of such a character that a sale thereunder would cut off the claim which it was charged that the city was asserting. That pleading amounted to a distinct challenge to the latter to come in and assert its claim of right, so that if appellee should be successful, a sale under the decree would pass a title divested of the claim which the city was alleged to be asserting. In *Masters v. Templeton* (1884), 92 Ind. 447, the question arose as to the right of Masters to assert a vendor's lien as against one Beckett, it appearing that the latter claimed under a decree of foreclosure, in which it was alleged "that all of the defendants, other than the mortgagors, claimed to hold some interest

or lien in and upon said real estate, but that they took and held the same subject to Beckett's mortgage lien.' " The court said: "The decree in Beckett's favor concludes the appellant from asserting any right or lien in the land superior to his, because she was a party to that action, and her rights were foreclosed by the decree therein rendered. Our code [§269 Burns 1901, §268 R. S. 1881] provides

that 'any person may be made a defendant who

2. has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved.' This is a very comprehensive provision, and was meant to confer authority to settle in one suit all conflicting claims to property involved in the litigation. The rule is a wise and salutary one, for it enables the court to fully adjust all equities, to determine and protect all rights, and to put an end to litigation concerning the subject-matter of the suit by one decree. Multiplicity of actions is thus prevented, full force and effect secured to judicial decrees, and judicial sales made operative and effective. It has long been the law of this State, that conflicting claims of title may be settled, and questions of priority determined, in foreclosure suits, whenever the proper issues are tendered. * * * Prior to the adoption of the code system there was some reason for holding that the question of title could not be adjudicated in a foreclosure proceeding; for questions of title were triable only by courts of law, while the question of a right to a foreclosure was cognizable only by courts of chancery, and there was thus a conflict of jurisdiction whenever a legal title was asserted. This cannot happen under the code, where both law and equity jurisdiction are vested in one tribunal, where provision is made for bringing into court all parties interested, either in the property or the controversy, and where ample authority is conferred to determine all rights and adjust all equities in one suit. The provisions of our code upon

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the subject of parties are very comprehensive, and the provisions respecting judgments and decrees are also very full and liberal, and we should do violence to its letter and spirit if we did not hold, to borrow the language of its framers, that the 'ultimate rights of the parties' may be determined in one action." In *Ulrich v. Drischell* (1882), 88 Ind. 354, 360, this court said: "While it is true that a proceeding to foreclose a mortgage is not a suit to quiet title, it is also true that in very many essential respects it is closely analogous. The parties are brought into court in such a suit for the purpose of adjusting all equities, rights and interests in the land, and the question of their rights to the land is one of the principal and controlling questions of the case. It is, in truth, the dominating and leading purpose of the suit. The subject of the controversy is a thing—the mortgaged real estate—and this the decree directly affects, for it settles the rights of the parties to it, measures their equities and adjusts their interests." See, also, *Woodworth v. Zimmerman* (1883), 92 Ind. 349; *Adair v. Mergentheim* (1888), 114 Ind. 303; *Gaylord v. City of LaFayette* (1888), 115 Ind. 423.

The proposition is too well settled to require the citation of authorities that where evidence of the particular matters which are set up in an answer to which a

3. demurrer was sustained is admissible under the general denial, which was on file, the ruling, if erroneous, is harmless. Appellant cannot avail itself of its own action subsequent to the ruling on de-

4. murrer. The question is, did the sustaining of the demurrer constitute error at the time the ruling was made?

We may also call attention to the point made by appellee's counsel, that appellant was not circumscribed in the introduction of his evidence by the ruling on the third

5. paragraph of answer, since the same affirmative matters were available to it under the issues ten-

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dered by the first and second paragraphs of cross-complaint, citing *Luntz v. Greve* (1885), 102 Ind. 173; *State v. Hindman* (1903), 159 Ind. 586.

The cause went to trial on the issues as we have indicated that they existed, and we can only hold that the error relied on, in the state of the issues, is not available. Judgment affirmed.

TODD ET AL. v. CRAIL ET AL.

[No. 20,483. Filed April 4, 1906. Rehearing denied June 21, 1906.]

1. JURISDICTION.—*Highways.—Gravel Roads.—Boards of Commissioners.—Statutes.*—Where a petition for the construction of a gravel road is filed as provided for in the act of 1903 (Acts 1903, p. 255, §2) and the proper notice given as therein specified, the board of commissioners has jurisdiction thereof. p. 52.
2. SAME.—*Inferior Courts.—Decision on.—Collateral Attack.*—Where the question of jurisdiction of an inferior tribunal depends upon facts which it must determine, its decision thereon in favor of jurisdiction cannot be collaterally attacked. p. 53.
3. SAME.—*Inferior Courts.—Pleadings.—Presumptions.*—Where the law requires certain facts to be embodied in the papers, pleadings or documents of a cause, and the proper inferior court proceeds with the case, the courts will presume, on a collateral attack, that such facts properly appeared. p. 53.
4. SAME.—*Records.—Extrinsic Evidence.*—Where the face of the records of an inferior court do not affirmatively show jurisdiction, extrinsic evidence is admissible in aid thereof. p. 54.
5. JUDGMENT.—*Irregularities.—Collateral Attack.*—Where the court has jurisdiction, its actions, though irregular or erroneous, are not subject to a collateral attack. p. 54.
6. JURISDICTION.—*Regularity of Proceedings.—Presumptions.*—Where jurisdiction appears in a cause, the subsequent proceedings of the court will be presumed regular, unless the contrary affirmatively appears. p. 55.
7. JUDGMENT.—*Validity.—Highways.—Width.—Viewers' Report.—Approval.*—A judgment of the board of commissioners establishing a gravel road, but failing to set out its width in the judgment, is not void where it expressly approved the viewers' report, which did set out its width, and ordered the construction in accordance therewith. p. 55.

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8. **JUDGMENT.—Boards of Commissioners.—Technical Accuracy.**—Technical accuracy is not required in the orders and judgments of the boards of commissioners, and if substantially good, they cannot be collaterally attacked. p. 57.
9. **PLEADING.—Complaint.—Amendments.**—Refusal to permit an amendment of the complaint during trial is largely discretionary with the trial court. p. 57.
10. **APPEAL AND ERROR.—Supreme Court Rules.**—Failure to comply with Supreme Court rule 22 is fatal to the consideration of the alleged error. p. 57.
11. **TRIAL.—Evidence Admitted After.—Discretion.—Appeal and Error.**—Permission to admit in evidence the gravel road petition, the endorsement thereof by the auditor, the notice of presentation and affidavit of proof of posting, several days after the close of the trial of a suit to enjoin further proceedings in a gravel road case, is discretionary with the trial court, which discretion is subject to review only for abuse. p. 57.
12. **EVIDENCE.—Part of Viewers' Report.—Highways.—Gravel Roads.**—It is not error for the court to refuse to permit plaintiffs to introduce the favorable parts only of the viewers' report in a gravel road case, in a suit to enjoin further proceedings in the construction of such gravel road. p. 58.
13. **SAME.—Viewers' Report.—Fraud.—Irregularities.—Highways.—Gravel Roads.**—Evidence of fraud and irregularities in the viewers' report in a gravel road case is inadmissible in a suit to enjoin further construction of such road, where jurisdiction of the board of commissioners is proved. p. 58.
14. **SAME.—Entries.—Proof of Posting.—Highways.—Gravel Roads.**—In a suit to enjoin the further construction of a gravel road, defendants, to prove the board's jurisdiction, may introduce the entries of the board and the original written proof of posting notices of the presentation of the gravel road petition to such board. p. 58.

From Tipton Circuit Court; *James F. Elliott*, Judge.

Suit by George L. Todd and others against Ira F. Crail and others. From a decree for defendants, plaintiffs appeal. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

Oglebay & Oglebay, for appellants.

Gifford & Gifford and *Coleman & Carter*, for appellees.

jurisdiction of the board over the subject-matter and persons of appellants.

It is first insisted that the commissioners had no jurisdiction of the subject-matter to enable them to establish the gravel road, or appoint a constructing superin-

1. tendent, and that all proceedings purporting to effectuate these ends were void. It is the express legislative purpose to give to boards of commissioners, by the act of 1903, jurisdiction or power to construct, or improve by straightening, grading, draining and graveling, highways within the limits of their counties, and there can be no doubt of the jurisdiction in this case, if it is properly shown there has been a substantial compliance with the statute. The presentation of a petition, sufficient within the terms of section two, *supra*, praying for the improvement, and accompanied by proof that notice of the presentation had been given as required by said section, confers upon the board unmistakable jurisdiction of the subject-matter. Do these things sufficiently appear from the record before us? The first entry in the commissioners' record is in these words:

"Roley Smith, G. R.

Petition No. 41, May 18, 1903.

June 1, 1903.

Proof of notice filed. Petition filed showing petition signed by majority of resident abutting landowners of the county. Petition granted as prayed for, and George Potter, Samuel McReynolds and Tinker Neal appointed viewers and Alonzo Scott surveyor. Ordered to meet at the office of the county surveyor on June 26, 1903, and qualify and make view and make report."

In the above minutes it is shown that the first steps taken by the board in the Roley Smith gravel road, No. 41, was on June 1, 1903, when proof of notice was filed and a petition signed by a majority of abutting landowners of the county was presented, considered and granted, as

prayed. All that was necessary to the board's jurisdiction of the subject-matter was the presentation of a petition, signed by a majority of the abutters in the county, stating the kind of improvement prayed, the beginning and terminus of the road, and making proof that notice had been given of the presentation, as provided in section two, *supra*.

The board of commissioners is the only judge created by the legislature to determine whether its right to proceed in such a case accrues, by having presented to it

2. such a petition, and notice thereof, as the law requires as a prerequisite to its jurisdiction. There is no other tribunal to decide for it. Hence the doctrine that when a court of limited powers assumes and exercises jurisdiction in cases where it may be rightful, the existence of all preliminary facts essential thereto will be presumed, in an indirect proceeding, to have been established, and especially is this true in a case like this, where there is a total absence of averment of the nonexistence of such jurisdictional facts. "It is a well-settled principle," said this court in *Evansville, etc., R. Co. v. City of Evansville* (1860), 15 Ind. 395, 421, "that where the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle, by its decision, such decision is conclusive." See, also, *Board, etc., v. Montgomery* (1886), 106 Ind. 517, 519; *City of Terre Haute v. Beach* (1884), 96 Ind. 143, 155; *Chicago, etc., R. Co. v. Sutton* (1892), 130 Ind. 405, 411; *Bowen v. Hester* (1895), 143 Ind. 511, 517; *Runner v. Scott* (1898), 150 Ind. 441; *Board, etc., v. Aspinwall* (1858), 21 How. 539, 16 L. Ed. 208; *Evansville Ice, etc., Co. v. Winsor* (1897), 148 Ind. 682.

Another view leads to the same conclusion. Where the law requires certain material facts to be embraced in particular papers, pleadings or documents, in a col-

3. lateral attack, we will presume, in aid of the proceedings, that the requirement has been complied

with. *Hudson v. Voreis* (1893), 134 Ind. 642, 644. And for the same reason we may examine such papers, pleadings and documents, if sufficiently identified, when prop-

4. erly presented. In other words, where jurisdiction does not duly appear on the face of the record of an inferior court, in a proceeding, direct or indirect, it may be established by extrinsic evidence. *Clayborn v. Tompkins* (1895), 141 Ind. 19, 22.

So, assuming, without deciding, that the record of the commissioners does not of itself show jurisdiction, it is, as a memorandum by the court, sufficient beyond controversy, in support of the judgment, indirectly attacked, to warrant recourse to the files in the case and to the papers required by law to contain the missing facts, if any, necessary to jurisdiction.

Turning then to the bill of exceptions, it very clearly appears that the petition presented to the board on June 1, 1903, in Roley Smith gravel road, No. 41, and the notice of such presentation, and the proof thereof, are, in all respects, in conformity to the statute. There is, then, no doubt of the jurisdiction of the board, or of its authority to appoint viewers and a surveyor to view the route, and report upon the practicability of the improvement.

It has been many times held by the court, and is now firmly settled, that when it appears from the record that an inferior court of special and limited jurisdiction

5. —such as a board of commissioners—has once acquired jurisdiction of the subject-matter and parties, in the manner provided by the statute, its orders, rulings and judgments are held as invulnerable against collateral attack for error or irregularity in the proceedings, and are supported by the same presumptions of regularity, as if rendered by a court of general jurisdiction. *Argo v. Barthand* (1881), 80 Ind. 63; *Watson v. Crowsore* (1884), 93 Ind. 220; *Forsythe v. Kreuter* (1885), 100 Ind. 27; *Jackson v. State, ex rel.* (1886), 104 Ind. 516; *Adams v.*

Harrington (1888), 114 Ind. 66; *Chicago, etc., R. Co. v. Sutton* (1892), 130 Ind. 405, 411; *Rhodes-Burford Furniture Co. v. Mattox* (1893), 135 Ind. 372.

Jurisdiction being apparent, we will presume

6. here that all subsequent proceedings were regular, where the record does not show to the contrary.

But it is insisted by appellants that the final order of the board for the construction of the road was void because it does not state the kind, the

7. width, and the extent of the road, as required by section five of said act. Acts 1903, p. 255.

The board's order-book entry, after reciting briefly a trial and adverse finding against remonstrators, proceeds: "The board now finds for the petitioners, and approves the report of the viewers, with the following exception: That in addition to the specifications in said report there shall be two twenty-four-inch sewer tile in grade at Turkey creek bridge." The board also finds that said improvement is of public utility, and that the cost and damages will not exceed the benefits to be derived therefrom, "and now orders said road constructed, and appoints Roley Smith as superintendent for the construction of said road," and fixes his salary and bond.

The viewers' report was spread of record in full in the gravel road record. By this it appears that the viewers having qualified, proceeded to examine, lay out, and estimate the cost of constructing the gravel road described in the order, and stating that, after a careful and actual view of all the lands within two miles of said proposed road, that they believed would be affected, they located said road, estimated the cost, and found that the construction of said road would be of public utility and convenience, and that the costs and expenses thereof and resulting damages would be less than the benefits to the lands listed by them as benefited, that there would be no damages resulting to any one, and submitted with the report a list of

the benefits to each forty acres or less of the lands in the taxing district, a description of the work proposed, the grade, drains, culverts, kind of improvement, bridges, material, commencement, route and terminus of the proposed road. Then follows what purports to be the "specifications for the improvement." This document goes into detail of the right of way, specific description of beginning, route and terminus, excavations, embankments, grading, stone arches, flag culverts, pipe culverts, gravel, corner stones, width of roadway between fences, width of grade, and width and depth of gravel and side ditches, slope of embankments and cuts, etc.

The report further stated that they found the total benefits to the lands to be affected by the construction of the road was \$44,082.15, and the estimated costs and expenses \$26,449.29; that they had assessed the estimated costs to the lands they deemed benefited, which estimated costs assessed to each forty acres or less amounted to sixty per cent of the total benefits assessed to the same. A complete list of the lands and assessments was also filed as a part of the report.

Every fact important to the report of the viewers and the judgment of the court was embraced within the limits of the board's judgment record and the viewers' report, both of which records were introduced in evidence by appellants. The judgment record recites that "the board approved the viewers' report, with the following exception: that in addition to the specifications of said report there shall be two twenty-four-inch sewer tile put in the grade at Turkey creek bridge," following this additional provision of its own with a finding that the work was of public utility, and would cost less than the benefits, and closing the entry with these words: "And now orders said road constructed and appoints Roley Smith as superintendent for the construction." It is apparent from the amendment made by the board, just quoted, that it was its inten-

tion to adopt the report, particularly that part descriptive of the character and extent of the improvement, as a part of its order. *Spaulding v. Mott* (1906), *post*, 58.

It is a matter of general knowledge to courts and lawyers that the proceedings, orders and judgments of boards of commissioners, as a rule, are not formed and ex-

8. tended upon record with that precision and technical accuracy that is expected of the higher courts, and, if right in substance, their form is of little consequence. *Bittinger v. Bell* (1879), 65 Ind. 445, 459; *Ruston v. Grimwood* (1868), 30 Ind. 364. Therefore, while it may be said that this judgment record is informal and irregular, it is clear that it is not void, and is therefore beyond successful assault in a proceeding like this. *Stoddard v. Johnson* (1881), 75 Ind. 20, 30, and cases cited; *Spaulding v. Mott*, *supra*.

The refusal of the court to permit appellants to amend the fourth paragraph of their complaint after the trial had begun was a matter within the discretion of the

9. court and cannot be reviewed here. §397 Burns 1901, §394 R. S. 1881; *Rogers v. State, ex rel.* (1885), 99 Ind. 218, 226; *Chicago, etc., R. Co. v. Hunter* (1891), 128 Ind. 213, 214; *Lindley v. Sullivan* (1893), 133 Ind. 588, 589.

The legal sufficiency of the special findings is not before us, because there has not been the slightest effort on the part of appellants to comply with rule twenty-two

10. of this court. The facts found were in substance the same as those stated in the foregoing pages, and the conclusion of law thereon, that the plaintiffs take nothing by their suit, is correct.

Several days after the evidence was closed the court permitted appellees to introduce in evidence the original petition for the gravel road, its indorsement by the

11. auditor, and the original notice of presentation, and affidavit in proof of posting thereof. The evidence

was all in writing, and the propriety and justice of its introduction at that time rested within the sound discretion of the court, which does not appear to have been abused. *Holmes v. Hinkle* (1878), 63 Ind. 518, 523; *Stewart v. Stewart* (1902), 28 Ind. App. 378.

The court did not err in refusing to allow appellants to introduce a part only of the viewers' report. The statute specifies certain things the viewers must report

12. upon, but does not prescribe the form or phraseology of the report; and it is not permitted a party to select and introduce such parts of a written document as may advance his purpose, and withhold or exclude the remainder.

The eighth to the twenty-sixth specifications, inclusive, for a new trial relate to the exclusion of various items of evidence, all offered in support of the averments

13. of complaint charging fraud and irregularity in the viewers' report and other proceedings before the commissioners, which we have seen is unavailable in this kind of action; hence its exclusion was proper.

The remaining reasons for a new trial relate to the competency of the original written proof of the posting of notice of the presentation of the original petition

14. and the entry made by the board on June 1, 1903.

Both items were correctly admitted, as we have endeavored to show in a former part of this opinion. We find no available error. Judgment affirmed.

SPAULDING ET AL. v. MOTT ET AL.

[No. 20,572. Filed January 26, 1906. Rehearing denied June 21, 1906.]

1. **HIGHWAYS.**—*Gravel Roads.*—*Within Two Miles of County Line.*—*Taxing Districts.*—*Statutes.*—The manner of giving notice of the filing of a petition, the time and place of hearing, the report of the viewers and procedure outlined, clearly indi-

167	58
168	189
168	354
1167	57
168	67

167	58
169	76

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cate that the gravel road act of 1903 (Acts 1903, p. 255) did not create a taxing district composed of lands in separate counties. p. 62.

2. **HIGHWAYS.—Gravel Roads.—Statutes.—Construction.—Prior Statutes.**—In construing the gravel road act of 1903 (Acts 1903, p. 255) the courts will give weight to the fact that the similar act of 1877 (Acts 1877, p. 82) was uniformly construed and enforced by the proper officers as authorizing the construction of gravel roads up to the county lines without any attempt to assess the lands in the adjoining county within the statutory limit for the taxing district. p. 62.
3. **SAME.—Gravel Roads.—Prior Statutes.—Construction.—Presumptions.**—The presumption is that in passing the gravel road act of 1903 (Acts 1903, p. 255) the legislature had in mind the construction placed upon the prior, similar statute of 1877 (Acts 1877, p. 82), which authorized such roads to be built up to the county lines without attempting to assess lands in the adjoining county within the statutory limit for the taxing district. p. 64.
4. **SAME.—Gravel Roads.—Taxing Districts.—Statutes.**—The fact that the gravel road act of 1877 (Acts 1877, p. 82) provided that no such road should be constructed unless a majority in number of owners and the owners of a majority in acreage of the lands assessable should petition therefor, and the gravel road act of 1903 (Acts 1903, p. 255) provides that it shall only be necessary for a majority of the abutters so to sign, does not show a legislative intent to change the method of fixing the taxing districts therefor. p. 64.
5. **SAME.—Gravel Roads.—Taxing Districts.**—The gravel road act of 1865 (Acts 1865, p. 90), providing for a taxing district three-fourths of a mile distant from the proposed road, outside of the corporate limits of towns and cities, the assessments to be made on the valuation in the auditor's books, did not extend such taxing district across county lines, though the road might be nearer the county line than three-fourths of a mile. p. 65.
6. **CONSTITUTIONAL LAW.—Gravel Roads.—Taxing Districts.—Special Privileges.—Class Legislation.**—The gravel road act of 1903 (Acts 1903, p. 255), providing that taxing districts for the construction of such roads shall extend two miles from such improvement, is not unconstitutional as against article 1, §23, of the bill of rights, providing for equality of privileges for all citizens, because it may compel persons living close to the boundaries of counties to pay a greater share in the construction of such gravel roads built near county lines. p. 66.

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7. **CONSTITUTIONAL LAW.—Public Improvements.—Taxing Districts.—Legislative Discretion.**—The legislature has a discretionary power to fix the boundaries of the districts to be taxed for the cost of public improvements located therein. p. 67.
8. **PLEADING.—Plea in Abatement.—Insufficient.—Demurrer.—Defective.**—A bad demurrer is good enough for a bad plea in abatement. p. 67.
9. **JUDGMENT.—Validity.—Highways.—Width.**—A judgment of the board of commissioners establishing a gravel road, but not stating the width thereof, is not void, where such judgment approves and makes a part thereof a viewers' report which does state such width. p. 68.
10. **SAME.—Validity.—Highways.—Gravel Roads.—Taxing Districts.—Failure to Assess Part of Lands.**—A failure to assess all of the lands in a gravel road taxing district for the cost thereof does not render void the judgment establishing same, since the statute (Acts 1903, p. 255, §§2, 3) requires only that the lands benefited shall be assessed. *Greensburgh, etc., Turnpike Co. v. Sidener*, 40 Ind. 424, distinguished. p. 68.
11. **HIGHWAYS.—Gravel Roads.—Width.—Viewers' Report.—Statutes.**—A failure of the viewers' report to show the necessity for the widening of a public highway to make a gravel road thereof under the act of 1903 (Acts 1903, p. 255) does not prevent the board of commissioners from widening same, the statute making no provision requiring the viewers to report on such fact. *Gipson v. Heath*, 98 Ind. 100, and *Crow v. Judy*, 139 Ind. 562, distinguished. p. 70.
12. **SAME.—Gravel Roads.—Widening.—Procedure.**—The gravel road act of 1903 (Acts 1903, p. 255) requires the viewers first to determine whether a highway shall be widened or laid out on new ground and then that the board of commissioners shall finally settle such question. p. 71.
13. **SAME.—Gravel Roads.—Public Utility.—Appeal.**—Under the gravel road act of 1903 (Acts 1903, p. 255, §14) the decision of the board of commissioners that a proposed gravel road is of public utility is final; and an appeal to the circuit court cannot put such question in issue in such court. p. 71.
14. **SAME.—Gravel Roads.—Widening.—Evidence.—Sufficiency.—Exclusion on Appellant's Motion.—Estoppel.**—Appellant is estopped to question the jury's finding of a certain fact, when upon his motion the adverse party's material evidence thereof was improperly excluded. p. 71.
15. **APPEAL AND ERROR.—Evidence.—Exclusion.—Objection.—Changing Grounds of, on Appeal.**—An objection, on appeal,

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that the form of an excluded question was bad, will not be heard, where the only objection below was that such evidence "was not material." p. 72.

16. **PLEADING.**—*Motions.*—*Venire de Novo.*—A motion for a *venire de novo* cannot be sustained unless the verdict, general or special, is so defective that the court cannot understand it. p. 72.
17. **SAME.**—*Motions.*—*Venire de Novo.*—*Interrogatories to Jury.*—On a motion for a *venire de novo* a party cannot raise any question on the interrogatories to the jury, where such motion applied to the general verdict alone. p. 72.

From Tipton Circuit Court; *James F. Elliott*, Judge.

Gravel road proceedings by Asa E. Mott and others, against which Allen F. Spaulding and others remonstrate. From an order establishing such road, remonstrants appeal. *Affirmed.*

Oglebay & Oglebay, for appellants.

Beauchamp, Mount & Procter and *Coleman & Carter*, for appellees.

MONKS, J.—This proceeding was brought by appellees before the Board of Commissioners of the County of Tipton at the June term, 1904, of the said board, under the act of 1903 (Acts 1903, p. 255) to improve by grading, draining and graveling a public highway in said county which runs parallel with the west line of said county and one-fourth of a mile therefrom. Appellants appeared and filed separate remonstrances, and such proceedings were had that the board ordered the improvement to be made. On appeal to the court below certain assessments were modified and damages were allowed to two of the remonstrants. The controlling question in this case is the proper construction of said act of 1903. The board of commissioners and the court below held that under said act the taxing district was confined to Tipton county, and that no lands in Clinton and Howard counties could be assessed with benefits, although within two miles of the highway to be improved.

Appellants insist that (1) "the taxing district extends two miles from the highway improved, regardless of county lines; (2) that if it does not, no highway can be improved under said act of 1903, if any part of it is less than two miles from a county line, because all the lands within two miles, if benefited, must be assessed with benefits under said act; (3) if the construction given said law by the court below is correct, it is special and class legislation, for the reason that in one part of the county all the lands within two miles of the highway to be improved must be assessed, if benefited, while in another part of the county only part of the land within two miles of the improvement which is benefited can be assessed with benefits, thus giving the citizens of one portion of the county the advantage over those residing in another part of the county."

If appellants' construction of said act of 1903, as to the taxing district is correct, then no highway, any part of which is less than two miles from the state line, could be improved thereunder, because the legislature could not authorize the assessing of lands in another state, even if benefited and within two miles of the proposed improvement. And under appellants' contention any law would be unconstitutional which attempts to authorize the improvement of a highway so near the state line that the taxing district is thereby reduced at either end or on either side.

The manner of giving notice of the filing of the petition and of time and place of hearing the report of the viewers, as well as the procedure under said act, clearly in-

1. dicates that it was the legislative intent that the taxing district should not include any lands outside the county in which the highway to be improved is located.

There is another reason for the conclusion that this was the legislative intent in the enactment of the act of 1903.

The act of 1877 (Acts 1877, p. 82) provides for

2. the construction of gravel roads by the assessment of benefits on the lands benefited within two miles

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of the highway to be improved, but, like the act of 1903, in controversy here, there is no express provision limiting the taxing district to the county in which the highway to be improved is located. Said act of 1877 has been, since it took effect—a period of more than twenty-eight years—uniformly construed and enforced by the officers acting under its provision, without question, as authorizing the improvement of highways within less than two miles of the county line, and as limiting the taxing district to the county in which the proceedings were pending before the board of commissioners.

In *State Board, etc., v. Holliday* (1898), 150 Ind. 216, 42 L. R. A. 826, this court said on page 229: "Black, Interp. of Laws, p. 221, says: 'The executive and administrative officers of the government are bound to give effect to the laws which regulate their duties and define the sphere of their activities, and, in so doing, they must necessarily put their own construction upon such acts. When the courts shall have interpreted the laws, these officers are of course bound to accept and abide by their decisions. But in advance of such judicial construction, they must interpret the statutes for themselves, and to the best of their own abilities. * * * But it is a rule, announced by the Supreme Court of the United States, at an early day, and which has since been followed in numerous cases both in the federal and state courts, that the contemporaneous construction of a statute by the officers who have been called upon to carry it into effect, made the basis of their constant and uniform practice for a long period of time, and generally acquiesced in, and not questioned by any suit brought, or any public or private action instituted, to test and settle the construction in the courts, is entitled to great respect, and if the statute is doubtful or ambiguous such practical construction ought to be accepted as in accordance with the true meaning of the law, unless there are very cogent and persuasive reasons for departing from it.' To

the same effect is *Cooley*, Const. Lim. (6th ed.), 51-58." See, also, *City of Terre Haute v. Evansville, etc., R. Co.* (1897), 149 Ind. 174, 186, 37 L. R. A. 189, and cases cited; *City of Indianapolis v. Navin* (1898), 151 Ind. 139, 147, 41 L. R. A. 337, and cases cited.

Sutherland, Stat. Constr., §311, says: "The contemporary and subsequent action of the legislature in reference to the subject-matter has been accepted as con-

3. trolling evidence of the intention of a particular act." The same author (§333) says: "It is presumed that the legislature is acquainted with the law; that it has a knowledge of the state of it upon the subjects upon which it legislates; that it is informed of previous legislation and the construction it has received." The presumption is that the legislature knew of said construction of the act of 1877 when they passed the act of 1903. *State Board, etc., v. Holliday, supra*, pages 233, 234, and authorities cited. It is also said in Sutherland, Stat. Constr., §333: "If it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effectuate that intention." The provisions of the act of 1903, *supra*, so far as concerns the taxing district, are substantially the same as those in the act of 1877, *supra*, and no words used in said act show any intention to change the construction from that given to the act of 1877. The fact that the law of 1877 (§6859 Burns 1901, §5095 R. S. 1881) provides that the board of commissioners shall not make the order that the im-

4. provement be made "until a majority of the resident landholders of the county whose lands are reported as benefited and ought to be assessed, and also the owners of a majority of the whole number of acres of all lands that are reported as benefited and ought to be assessed," while section two of the act of 1903 contains no such provision, but only requires that the petition be "signed by a majority of the resident landholders of the

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county whose lands abut upon the proposed improvement," does not show a legislative intent that the taxing district provided in the act of 1903 should be in any way different from what it was under the act of 1877.

Appellants cite *Crist v. State, ex rel.* (1884), 97 Ind. 389, and *State, ex rel., v. Elliott* (1904), 32 Ind. App. 605, which hold that under certain drainage laws where a ditch is constructed in one county, land located in another county receiving special benefits from the construction of said ditch may be assessed with such benefits, as sustaining their contention in this case. Said acts provide for the construction of a drain extending into two or more counties as a unit throughout its whole extent and under one authority, and authorize the assessment of all the lands in said counties benefited by said ditch, while under the act of 1903, if the highway to be improved extends into more than one county, the same must be improved in each county by separate and independent proceedings, neither depending in any manner upon the other. Acts 1903, p. 255, §18. The authorities cited are not in point here. Thus construed as to taxing districts we do not think said act unconstitutional.

The act of 1865 (Acts 1865, p. 90) provided that for the construction of a gravel road "all real estate outside of the corporate limits of any town

5. or city incorporated as such, three-fourths of a mile each side of the proposed road, shall be taxed to construct the said road in proportion to the appraisement of the realty that may be on the auditor's books," and that each owner shall pay his proportion of the cost of the proposed turnpike according to the amount of the assessment of the real estate within the prescribed limits. It will be observed that under this law the taxing district did not include any land at the ends of the proposed road, even if the same were benefited as much as or more than lands in the taxing district which could not be

taxed therefor. It is evident that, if a highway to be improved under said act was less than three-fourths of a mile from the county line, no tax could be levied on land in the adjoining county, although within three-quarters of a mile of the improvement, and specially benefited thereby. In other words, the taxing district under said act could in no case extend beyond the county line, although the improvement was less than three-fourths of a mile therefrom.

The act of 1867 (Acts 1867, p. 167) and the act of 1869 (Acts 1869 [s. s.], p. 73) provided for the construction of gravel roads by assessment of benefits on

6. all the lands within one and one-half miles on either side or within one and one-half miles of either end of the proposed improvement, if in the county. It will be observed that said acts expressly limit the taxing district to the county in which the highway to be improved is located. It is clear that if the act of 1903, *supra*, is unconstitutional for the reason urged by appellants, that the acts of 1865, 1867, and 1869, *supra*, were unconstitutional for the same reason.

Commencing in 1865, forty years ago, the legislature has, as we have shown, repeatedly enacted laws containing the provisions which appellants claim render the act of 1903 unconstitutional. The constitutionality of these laws has never before been challenged on the ground urged by appellants, but they have been treated and enforced by all officers as valid in this respect. This practical construction upon the question raised is influential. *City of Terre Haute v. Evansville, etc., R. Co., supra*; *City of Indianapolis v. Navin, supra*; *French v. State* (1894), 141 Ind. 618, 628, 29 L. R. A. 113; *Hovey v. State, ex rel.* (1889), 119 Ind. 386; *Fall v. Hazelrigg* (1874), 45 Ind. 576, 585, 15 Am. Rep. 278; *State, ex rel., v. McAlister* (1895), 88 Tex. 284, 31 S. W. 187, 28 L. R. A. 523; Black, Const. Law, p. 71. It is evident, however, that said act as construed concerning the taxing district operated alike in all

parts of the State under similar circumstances and conditions, and is not, therefore, either special or local (*State, ex rel., v. Smith* [1902], 158 Ind. 543, 554, 555, and cases cited); nor does it "grant privileges or immunities to any citizen or class of citizens which upon the same terms do not belong to all citizens."

It is settled, however, as a general rule, that it is within the discretion of the legislature to determine what property, as regards its location with respect to the local im-

7. provement, shall be assessed. 1 Cooley, Taxation (3d ed.), 234-240; 2 Cooley, Taxation (3d ed.), 1180, 1207, 1208; 25 Am. and Eng. Ency. Law (2d ed.), 1189, and cases cited in notes 7, 8, 10; Elliott, Roads and Sts. (2d ed.), §§558, 560, 564; *Voris v. Pittsburg Plate Glass Co.* (1904), 163 Ind. 599, 606-608, and authorities cited; *Gilson v. Board, etc.* (1891), 128 Ind. 65, 69-74, 11 L. R. A. 835; *Board, etc., v. Harrell* (1897), 147 Ind. 500, 504-507; *Lowe v. Board, etc.* (1901), 156 Ind. 163; *Adams v. City of Shelbyville* (1900), 154 Ind. 467, 478, 49 L. R. A. 797, 77 Am. St. 484; *Byram v. Board, etc.* (1896), 145 Ind. 240, 248-251, 33 L. R. A. 476; *Brown v. Miller* (1904), 162 Ind. 684, 686-687; *West Chicago Park Com. v. Farber* (1898), 171 Ill. 146, 49 N. E. 427, and cases cited; *Lincoln v. Board, etc.* (1900), 176 Mass. 210, 57 N. E. 356, and cases cited; *Dorgan v. City of Boston* (1866), 12 Allen 223.

Appellants insist that the court below erred in sustaining a demurrer to their plea in abatement, because the demurrer was so defective in form as to present no question.

8. The plea in abatement proceeded upon the theory that the taxing district in this case extended into Clinton and Howard counties, which theory, as we have shown, was erroneous, and said plea was insufficient for that reason. It is settled that, even if a demurrer is so defective in form as to present no question, it is not reversible error to sustain the same, if the pleading to which

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it is addressed is bad. *Hanson v. Cruse* (1900), 155 Ind. 176, 178; *Bollman v. Gemmill* (1900), 155 Ind. 33, 36; *Garrett v. Bissell, etc., Works* (1900), 154 Ind. 319, 321, and authorities cited; *Goldsmith v. Chipps* (1900), 154 Ind. 28, and cases cited; *Wray v. Fry* (1902), 158 Ind. 92, 96.

It is next insisted by appellants that the order of the board of commissioners that the improvement be made is void, because it does not state the kind of improve-

9. ment to be made, and does not state the width and extent of the same as required by section five of the act of 1903, *supra*. The report of the viewers contains the plans and specifications for said improvement and is a part of the order of the board, and said order, when so considered, states the kind of improvement to be made and the width and extent thereof. Whether said order would be void for the reason urged we need not determine, because when the report of the viewers is read as a part thereof it fully complies with the requirements of said section five.

Appellants claim that there are several tracts of land in Tipton county and in said taxing district which were benefited by said proposed improvement, but were

10. not assessed with benefits, and that the failure to assess the same renders the proceeding void; citing *Greensburgh, etc., Turnpike Co. v. Sidener* (1872), 40 Ind. 424, 428, 429, and other cases which hold under Acts 1867, p. 167, §2, and Acts 1869 (s. s.), p. 73, §3, that when the assessors omitted in the list of lands returned by them any land within the taxing district "their entire assessment is void and an injunction will lie to prevent its collection." Said acts of 1867 and 1869 imperatively required the assessors "to make a list of all the lands" within the taxing district, "and to assess the amounts of benefit that will result from the proper construction and maintenance of such proposed road, and report the same to the

county auditor in writing and append thereto their affidavit that the same is correct," etc. In *Greensburgh, etc., Turnpike Co. v. Sidener, supra*, this court said on page 429: "The above statute expressly, absolutely, and imperatively requires of the assessors that they shall view all the lands and make a list of all the lands within the prescribed bounds, but the assessment of benefits does not necessarily follow the viewing and listing of all such lands. Whether the lands viewed and listed are benefited, and if so, to what extent, is a matter of judgment, to be determined by the assessors from the facts and circumstances attending and surrounding each assessment of benefits." These cases are not in point here because the act of 1903, *supra*, does not require the viewers to make "a list of all the lands in the taxing district," but section two of said act provides that "they shall upon actual view of all lands" within the taxing district "apportion the costs, expenses and damages upon all the lands" within the taxing district "that are benefited, according to the benefits derived therefrom." And section three of said act requires that they "make a report to the board of commissioners, and file the same with the auditor of the county, which report shall show the public utility or convenience of the proposed improvement, an estimate of the costs and expenses thereof, the damages assessed to the several tracts of lands, the benefits of each forty acres or less tract of land where such exists, and give a description of the work proposed, the grade, drains, culverts, kind of improvement, the commencement and terminus of the road." It is manifest that the viewers under said act of 1903 are not required to make and report a list of all the lands in the taxing district, but only the lands in the taxing district that are benefited or damaged. The report of the viewers states that it reports the lands that will be benefited and that no lands will be damaged by the improvement. The report of the viewers purports to contain a list of all the lands benefited by the

proposed improvement, and, if any lands benefited thereby were omitted, the report may be corrected by amendment at any time under section six of the act of 1903, *supra*. It is evident that the failure of the viewers to assess all lands in the taxing district benefited by the proposed work does not render the proceeding void. *Bowen v. Hester* (1896), 143 Ind. 511, 515-519.

The highway to be improved was thirty-three feet wide, and the order of the board following the viewers' report established the width thereof

11. at thirty-six feet. Appellants insist that under the gravel road law of 1903, the board has no power to widen the highway to be improved, except it be rendered necessary for the purpose of shortening, straightening or draining the road, which necessity must be shown in the report of the viewers; citing *Gipson v. Heath* (1884), 98 Ind. 100; *Crow v. Judy* (1894), 139 Ind. 562. Said cases were under the act of 1877 (Acts 1877, p. 82), but it was not held in either of them that the board of commissioners had no such power unless the necessity therefor was shown by the report of the viewers. The act of 1903 (Acts 1903, p. 255) authorized the viewers "to examine, view, lay out or straighten such roads as in their judgment public utility or convenience require," and section three of said act of 1903, heretofore set out, provides what the report of the viewers shall contain. There is nothing in said section requiring the report to contain the statement contended for by appellants.

At the request of appellants the court submitted to the jury the following interrogatory to be answered if they agreed upon a general verdict: "Is the widening of the existing road to the width of thirty-six feet rendered necessary in order to shorten or straighten it or for the purpose of obtaining a better route?"—which the jury answered, "Yes." Appellants, however, insist that there was no evidence to sustain this finding. During the trial appellees

offered to prove by a witness in their behalf that it was necessary that said improvement be established at the width of thirty-six feet in order to get the proper drainage and grade for the same, but the evidence was excluded, on the objection of appellants, on the ground stated by the court that the same "was not material."

It would seem from an examination of sections 2, 3, 5, 7 and 14 of said act of 1903, that the highway to be improved is to be widened, or laid out on new ground at
12. places, if public utility or convenience requires it.

This question is first to be determined by the viewers and finally by the board of commissioners. The fifth ground of remonstrance provided by said act is "that the proposed work is not of public utility or convenience," and it is provided in section fourteen of said
13. act that the decision of the board of commissioners, as to said fifth cause for remonstrance, "shall be final and no appeal allowed therefrom."

If the question whether public utility or convenience required the widening of said highway could not be tried in the court below because not appealable, the
14. court's ruling that said evidence was not material was correct. But even if the question of widening said highway was before the court below for determination, appellants cannot, after the evidence was excluded as not material, on their objection, complain on the ground that there was no evidence to sustain the jury's answer to said interrogatory. This is true, because it is well settled that one on whose objection competent evidence to prove a fact is excluded cannot afterwards say that the fact was not proved. *Thompson v. McKay* (1871), 41 Cal. 221; *Greeley v. Provident Sav. Bank* (1890), 103 Mo. 212, 221; *Jobbins v. Gray* (1889), 34 Ill. App. 208, 219; *Insurance Co. v. O'Connell* (1889), 34 Ill. App. 357, 362; *Elliott, App. Proc.*, §630, and cases cited; *Bigelow, Estoppel* (5th ed.), p. 720.

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Appellants attempt to avoid this rule, on the ground that "the question propounded to the witness was improper in form and the objection was therefore good." The

15. objection, however, was not to the form, but was general, and the court sustained the objection, not on account of the form of the question, but on the ground that the evidence was not material. This brings the case clearly within the rule.

Each appellant filed a motion for a *venire de novo*, on the ground that "the verdict of the jury is so defective, uncertain and ambiguous that no judgment can be

16. rendered thereon." The rule in this State is that a motion for a *venire de novo* will not be sustained unless the verdict, whether general or special, is so defective and uncertain that no judgment can be rendered upon it. A verdict, however informal, is good if the court can understand it. The general verdict finds upon all the issues as to each appellant, and when these findings are read and construed together there is no difficulty in rendering judgment thereon.

Appellants Spaulding and Spaulding call attention to the fact that the jury, in answer to an interrogatory submitted to them, "found that the land of said Spaul-

17. dings is assessed too much as compared with the land of Asa E. Mott, which is assessed with benefits, and no reduction was made in their assessment." The general verdict found in favor of appellees against said appellants Spaulding and Spaulding on all the issues between them. As their motion for a *venire de novo* only applied to the general verdict, no question was raised concerning the finding of the jury in answer to said interrogatories. The motions for a *venire de novo* were properly overruled. *Central Union Tel. Co. v. Fehring* (1896), 146 Ind. 189, 193.

What we have said disposes of all the questions presented by the record. Finding no reversible error, the judgment is affirmed.

LAPORTE LAND COMPANY ET AL. v. MORRISON
ET AL.

[No. 20,673. Filed June 26, 1906.]

1. **APPEAL AND ERROR.**—*Parties.*—*Devises.*—*Abatement and Revival.*—Where a party to a proceeding for the establishment of a drain dies after judgment but before appeal, her devisees or heirs must be made parties to the assignment of errors on appeal. p. 74.
2. **SAME.**—*Parties.*—*Abatement and Revival.*—*Executors and Administrators.*—*Judgment.*—*Costs.*—The executor of the estate of a testate party to a ditch proceeding, in whose favor a judgment for costs had been rendered, is a proper party, together with the devisees, to the assignment of errors in such cause on appeal, the party having died after judgment and before appeal. p. 75.
3. **SAME.**—*Parties.*—*Death.*—*Jurisdiction.*—The Supreme Court has no jurisdiction of a cause on appeal where a party to the judgment below died before such appeal was taken, and her proper representatives were not made parties to the assignment of errors. p. 76.
4. **SAME.**—*Vacation.*—*Parties.*—*Dismissal.*—Where all of the parties to the judgment below are not made parties on a vacation appeal, the Supreme Court has no jurisdiction, and the appeal will be dismissed. p. 76.

From Laporte Circuit Court; *Walter A. Funk*, Special Judge.

Drainage petition by the Laporte Land Company, against which Edith Morrison and others remonstrate. From a judgment against petitioner, it and another appeal. *Appeal dismissed.*

Darrow & Worden, for appellants.

J. F. Gallaher, John B. Cockrum, Osborn & McVey and *Julius C. Travis*, for appellees.

JORDAN, C. J.—This was a proceeding for the construction of a public ditch under the drainage law of 1885 (Acts 1885, p. 129) and amendments, including the act of 1903 (Acts 1903, p. 383). The following appear to be the

steps taken therein: Appellant Laporte Land Company, as the sole petitioner, filed a petition on March 26, 1904, in the clerk's office of the Laporte Superior Court for the construction of the ditch involved in this proceeding. Notice was given to the owners and occupants of the several tracts of land that would be affected by the construction of the improvement, and the case was docketed in said Laporte Superior Court as a cause pending therein, and subsequently was referred to the drainage commissioners, as required by the statute. These commissioners made their report to the court, making assessments against the lands benefited by the proposed ditch. A change of venue was taken to the Porter Superior Court, and subsequently the cause was changed from the latter court to the Laporte Circuit Court. Motions were made by the several landowners, who were remonstrators in the proceedings, to dismiss the action for want of jurisdiction of the court to entertain the same. On July 6, 1904, these motions were sustained, and judgment was rendered against the petitioner for cost. To reverse this judgment appellants prosecute this vacation appeal.

Some of the appellees herein have moved to dismiss the appeal. The following are the verified facts upon which the motion is based: Elizabeth Place, a party to

1. the proceedings below and a landowner whose lands had been assessed for the construction of the ditch and who was a remonstrator against said assessments, died testate, the owner of the aforesaid lands, at Laporte county, Indiana, on April 24, 1905, after the rendition of the final judgment dismissing the proceedings and adjudging costs against appellant, but before this appeal was taken. She left surviving her as her sole heirs several children, who were devisees under her will, and to whom the lands so assessed and involved in this proceeding were devised. The will was duly probated in Laporte county on May 2, 1905, and the persons therein nominated as execu-

tors duly qualified. The appeal was taken on July 6, 1905, on which date the transcript and assignment of errors were filed in the office of the Clerk of the Supreme Court. Although Mrs. Place had died more than two months prior to the taking of the appeal, nevertheless her name was inserted in the assignment of errors as a coappellee with other parties. None of her said heirs or devisees who, under the will, succeeded to her interest in the lands, nor the executors thereof, have been made appellees. The motion to dismiss is, therefore, made on the ground that appellant has failed to make all persons appellees who are proper and necessary as such parties.

In addition to the heirs or devisees of Elizabeth Place, other persons who should have been made appellees have been entirely omitted in appellants' assignment of errors. It is insisted that, by reason of appellants' failure to make all persons appellees who are necessary as such, we have no jurisdiction to determine the case on its merits, and that the motion to dismiss must be sustained. In this contention we concur. Under the circumstances, had Elizabeth Place been living at the time the appeal was taken she certainly would have been a necessary party appellee. She having died after the rendition of the final judgment in the lower court, but before the appeal was taken, appellant company should have proceeded under §648 Burns 1901, §636 R. S. 1881, and made as appellees in her place the persons who, under her will, succeeded to her interest or title in and to the lands which had been assessed for the construction of the ditch. *Rich Grove Tp. v. Emmett* (1904), 163 Ind. 560, and cases cited.

Possibly by reason of the fact that the lower court in dismissing the proceedings rendered a judgment for costs

in favor of Mrs. Place and others, the executors of

2. the will would also have been necessary parties to the appeal. Making her a party after she was dead was, in all respects, a nullity, and is of no avail whatever,

as this court cannot acquire or obtain jurisdiction over appeals which are prosecuted by or against parties

3. who died after the rendition of the final judgment but before the appeal was taken. *Moore v. Slack* (1894), 140 Ind. 38, and cases cited; *Hewitt v. Mills* (1901), 27 Ind. App. 218; *Doble v. Brown* (1898), 20 Ind. App. 12.

Had Mrs. Place been alive when the appeal was taken, she having been an adverse party to appellant in the lower court and one in whose favor the final judgment

4. was rendered, appellant necessarily would have been required to make her an appellee, otherwise we would have had no jurisdiction to decide the case on its merits, and dismissal of the appeal would have resulted. *Kreuter v. English Lake Land Co.* (1902), 159 Ind. 372, and cases cited; *Kuhn v. American Mut. Life Ins. Co.* (1903), 160 Ind. 356; *Moore v. Ferguson* (1904), 163 Ind. 395; *Haymaker v. Schneck* (1903), 160 Ind. 443; *Abshire v. Williamson* (1898), 149 Ind. 248; *Rich Grove Tp. v. Emmett*, *supra*.

Under the circumstances, the omission to make parties to the appeal those who succeeded to the interest of Mrs. Place in the lands affected by the proposed ditch, leaves the matter of the appeal in the same condition as it would have been had she been living at the time it was taken and appellant had failed to make her a party appellee.

For the reasons urged, the motion to dismiss is sustained and the appeal herein is dismissed.

CARR ET AL v. DUHME ET AL.

[No. 20,698. Filed June 26, 1906.]

1. **APPEAL AND ERROR.—Parties.—Jurisdiction.—Suggestion of Want of.**—Where the parties to the action below are not made parties on appeal, the Supreme Court has no jurisdiction; and the suggestion of a want of jurisdiction requires a consideration of such question. p. 78.

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2. **APPEAL AND ERROR.—Final Judgment.—Remanding Case to Board.**—An order of the circuit court sustaining a motion to remand a case back to the board of commissioners because the cause had been decided by two only of such commissioners, one of whom was a party thereto, is final, and an appeal lies therefrom. p. 79.
3. **DRAINS.—Petition.—Notices.—Jurisdiction.**—The filing of a petition and the giving of notice as prescribed by §§5655, 5656 Burns 1901, §4285 R. S. 1881, and Acts 1893, p. 329, invests the board of commissioners with jurisdiction in a drainage proceeding. p. 79.
4. **CONSTITUTIONAL LAW.—Courts.—Judges.—Parties.**—No judge can decide his own case; and a statute giving him such right is unconstitutional. p. 79.
5. **COURTS.—Judges.—Interest in Pending Case.—Common Law.**—At the common law the disqualification of a judge because of interest in the litigation did not affect his jurisdiction; but a refusal, upon motion, to vacate the bench was reversible error. p. 80.
6. **SAME.—Judges.—Interest in Pending Case.—Judgment.—Validity.**—Where, by statute, a judge interested in a pending case is disqualified from sitting, his judgment is void. p. 81.
7. **SAME.—Boards of Commissioners.—Interested Member.—Judgment.**—A judgment rendered by a board of commissioners, one of whom is an interested party, is voidable and not void, there being no statutory disqualification in such case. p. 82.
8. **SAME.—Boards of Commissioners.—Interested Member.—Waiver.—Estoppel.**—Parties to a cause before the board of commissioners, a member of which is an interested party, may, by permitting such cause to proceed to judgment without objection, waive such disqualification, there being no statutory disqualification in such case. p. 82.

From White Circuit Court; *T. F. Palmer*, Judge.

Drainage proceedings by John P. Carr and others, against which Ophelia F. Duhme and others remonstrate. From a judgment sustaining remonstrants' motion to remand the cause to the board of commissioners, petitioners appeal. *Reversed.*

George B. Sellers and *Fraser & Isham*, for appellants.
Reynolds, Sills & Reynolds and *Benjamin F. Carr*, for appellees.

MONTGOMERY, J.—This proceeding was commenced before the Board of Commissioners of the County of White upon a petition by appellants for the construction of a ditch. In the absence of one of the members of the board the remaining members, Joseph Taylor and George T. Inskeep, appointed viewers, who viewed the proposed ditch, made and filed their report finding the same to be of public utility, and assessed benefits for its construction. Notice of the pendency of said petition and report, and of the time fixed for the hearing of the same, was given as required by law. This report disclosed that lands of said Joseph Taylor would be benefited by, and should be assessed for, the construction of the proposed drain. Taylor thereupon filed a remonstrance against the proposed ditch, and remonstrances were also filed by the appellees and others. Reviewers were appointed by the board, who subsequently made their report, to which certain objections were made by appellees. These objections were heard and overruled, and final judgment entered establishing the ditch and ordering its construction, from which an appeal to the circuit court was taken by appellees. In the circuit court appellees objected to the jurisdiction of the court, and moved that the cause be certified back to the board, with instructions to set aside the appointment of viewers and all subsequent proceedings, for the reason that said Taylor participated as a commissioner in said proceedings, when because of interest in the subject-matter he was disqualified from so acting. This motion was sustained, to which ruling appellants excepted. The decision of the court refusing to assume jurisdiction and ordering the proceedings and papers certified back to the office of the auditor is assigned as error.

Appellees have filed a motion to dismiss this appeal because there was no final judgment rendered, and because

George R. Hayes has not been made a party to the

1. assignment of errors. The presence of all necessary parties is essential to jurisdiction, and the sugges-

tion of an apparent defect of parties requires consideration. It does not appear, however, that George R. Hayes was a party in the court below to the proceeding and judgment from which this appeal is prosecuted. The

2. action of the court below disposed of the case, so far as that court had power to dispose of it, and was a final judgment, from which an appeal is authorized. *Starkey v. Starkey* (1906), 166 Ind. 140. Appellees' motion to dismiss is overruled.

The board of commissioners by virtue of §§5655, 5656 Burns 1901, §4285 R. S. 1881 and Acts 1893, p. 329, had unquestioned jurisdiction of the subject-matter,

3. and acquired jurisdiction of the parties by giving the notice therein required. The alleged want of jurisdiction in the court below is predicated upon the palpable disqualification of Mr. Taylor to act as a commissioner in this proceeding, and rests upon the assumption that his participation rendered the action of the board entirely void. If the participation of an interested member of the board so affects its jurisdiction as to make its judgment void, then the invalidity cannot be cured even by consent of the parties; but if such improper action is a mere irregularity or error rendering such proceeding voidable only, then the disqualification and consequent error may be waived by failure to make seasonable objection to the same. The holdings of the courts of this country are not in entire harmony upon this question. The apparent conflict has arisen in part from the absence of express legislative provisions, as well as from the varying statutes of the several states upon the subject of the disqualification of judges and judicial tribunals. It is an ancient maxim of the law, that no man should be a judge in his

4. own cause, and this principle still prevails wherever judicial tribunals are maintained. *Winters v. Coons* (1904), 162 Ind. 26. It is of such potent force that, under our constitutions and enlightened sense of jus-

tice, a legislative act which should undertake to make a man arbiter of his own case would be held void. Cooley, Const. Lim. (5th ed.), *407-*410.

At common law the disqualification of a judge because of interest in the subject-matter brought before him did not affect his jurisdiction, and his acting in the cause

5. was regarded as a mere irregularity or error, on account of which a timely recusation would afford ground for the reversal of his judgment upon appeal or writ of error. 1 Freeman, Judgments (4th ed.), §145; *Dimes v. Grand Junction Canal Co.* (1852), 16 Eng. L. & Eq. 63; *Trawick v. Trawick* (1880), 67 Ala. 271; *McMillan v. Nichols* (1878), 62 Ga. 36, 38; *Succession of Rhea* (1879), 31 La. Ann. 323; *Gorrill v. Whittier* (1825), 3 N. H. 265; *Ten Eick v. Simpson* (1844), 11 Paige 177; *Chambers v. Hodges* (1859), 23 Tex. 104.

In support of their contention that the proceedings in question were absolutely void, appellees' counsel cite cases from Michigan and California. Section 7245 Howell's Statutes of Michigan provides: "No judge of any court shall sit as such in any cause in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." The supreme court of that state said upon this subject: "This statute, mandatory in its terms, voices the universal sentiment of mankind excluding judges from sitting in cases where they are parties or are interested. * * * The authorities are numerous, and nearly uniform, which hold that a judgment or decree rendered by a judge contrary to a statute like ours is void, and may be attacked collaterally." *Horton v. Howard* (1890), 79 Mich. 642, 44 N. W. 1112, 19 Am. St. 198.

The decisions of the California supreme court rest upon a statute which reads as follows: "No justice, judge, or justice of the peace shall sit or act as such in any action

or proceeding: 1. To which he is a party or in which he is interested." §170 Code Civ. Proc.

Mr. Freeman in his authoritative work on judgments has collected many cases, from which he announces the following conclusion: "But the general effect of the statutory prohibitions in the several states is undoubtedly to change the rule of the common law so far as to render those acts of a judge, involving the exercise of judicial discretion, in a case wherein he is disqualified from acting, not voidable merely, but void." 1 Freeman, Judgments (4th ed.), §146.

In the absence of prohibitory legislation the question of the interest or bias of a judge is regarded as a private matter and of concern only to the parties to the

6. action. But when constitutional or statutory provisions forbid a judge from acting officially, his action is regarded as transgressing the public policy of the state. Such prohibitions are plainly intended not for the protection of the parties to a suit merely, but for the general interests of justice, by preserving the purity and impartiality of the courts, and the respect and confidence of the people for their decisions. No judgment is worthy to become a precedent which is tainted with a suspicion of unfairness, and the state is deeply interested in maintaining, so far as possible, an elevated place for its judiciary in the estimation of mankind. A party may induce a judge whom he knows to be interested in the result or related to his adversary to try his cause, and yet when judgment is pronounced against him murmur and complain. It is most appropriate and salutary that the legislature should, by the enactment of suitable statutes, prohibit the wearers of the judicial ermine from serving in any case wherein their judgment might be biased by interest or kinship. In jurisdictions where such statutes exist, a violation of their provisions, when manifest from the record, renders the proceedings void. *Fechheimer v. Washington* (1881), 77 Ind. 366; *Chambers v. Hodges*, *supra*; *Horton v. Howard*,

supra; *People, ex rel., v. De la Guerra* (1864), 24 Cal. 73; *Hall v. Thayer* (1870), 105 Mass. 219, 7 Am. Rep. 513.

There is no statute in this State relating to the disqualification of commissioners and prohibiting them from serving in matters in which they are interested, hence

7. their action is governed by common-law principles.

A proper sense of propriety should in all cases prevent a member from acting in any proceeding to which he is a party, but if, disregarding such disqualification in a matter over which the board has jurisdiction of the subject and the parties, he does participate in rendering a judgment from which an appeal is allowed, his act and the action of the board will not be void, but only voidable. *Board, etc., v. Justice* (1892), 133 Ind. 89, 36 Am. St. 528; *Rogers v. Felker* (1886), 77 Ga. 46; *Wilson v. Smith* (1897), (Ky.), 38 S. W. 870; *State, ex rel., v. Ross* (1893), 118 Mo. 23, 23 S. W. 196; *Fowler v. Brooks* (1887), 64 N. H. 423, 13 Atl. 417, 10 Am. St. 425.

In cases where the disqualification of the judge renders the proceeding voidable merely and not void, it may be waived by consent of parties. The disqualification

8. of Taylor as a commissioner in this proceeding was disclosed by the record and known to the parties.

It was appellees' duty, if they desired to object to his acting because of interest, to make such objection at the earliest opportunity, and thereby prevent the accumulation of needless costs and the attainment of a fruitless result. If a party, knowing of a valid objection to a proceeding, neglects to avail himself of it, and stands by or participates therein until a result is reached adverse to his interests, it is but justice that he should bear the consequences which his own folly has suffered to occur. Appellees made no objection, but knowingly acquiesced in the appointment of viewers and in Taylor's subsequent participation in the proceedings and final judgment. The board should have been given an opportunity to correct its own errors while

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the matter was before it. Appellees' silent acquiescence in the action of the board, as shown by the record, was a waiver of the disqualification of Taylor, complained of for the first time on appeal. *Moses v. Julian* (1863), 45 N. H. 52, 84 Am. Dec. 114; *Shope v. State* (1898), 106 Ga. 226, 32 S. E. 140; *Thomas v. Jones* (1879), 64 Ga. 139; *Stone v. Marion County* (1889), 78 Iowa 14, 42 N. W. 570; *Pettigrew v. Washington County* (1884), 43 Ark. 33; *Ex parte Hilton* (1902), 64 S. C. 201, 41 S. E. 978, 92 Am. St. 800; *Stearns v. Wright* (1872), 51 N. H. 600, 610; *Smith v. Amiss* (1903), 30 Ind. App. 530; *Du Quoin Water-Works Co. v. Parks* (1904), 207 Ill. 46, 69 N. E. 587; *Case v. Hoffman* (1898), 100 Wis. 314, 356, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 728.

It follows that the court erred in sustaining appellees' motion and in remanding the cause to the board of commissioners without a trial. The judgment is reversed, with directions to overrule appellees' motion to remand, and for further proceedings in accordance with this opinion.

TISDALE v. THE STATE.

[No. 20,731. Filed June 26, 1906.]

167	83
171	101

1. **APPEAL AND ERROR.**—*Supreme Court Rules.*—*Briefs.*—A failure by appellant to prepare his transcript as prescribed by rule 3 of the Supreme Court, and to prepare his brief according to rule 22, especially after objection has been made because thereof, is fatal to any questions sought to be presented by such appeal. p. 84.
2. **SAME.**—*Dismissal.*—*Affirmance.*—*Discretion of Court.*—Where the year within which an appeal may be taken has not expired, and appellant has failed to comply with the court rules in presenting his case on appeal, the Supreme Court may, in its discretion, dismiss the appeal instead of affirming the judgment. p. 85.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Prosecution by the State of Indiana against Finis Tisdale. From a judgment of conviction, he appeals. *Appeal dismissed.*

Thomas Duncan, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

MONKS, J.—Appellant was convicted of the crime of rape, and final judgment rendered against him on August 26, 1905.

By his counsel he contends: (1) That the verdict of the jury is contrary to the law and the evidence. He admits the act of intercourse, but insists that the evidence did not show such resistance on the part of the prosecuting witness as the law requires to sustain a charge of rape. (2) That there was no proof that the alleged offense was committed in Gibson county, Indiana, as alleged in the indictment. For these reasons he insists that this court should "give him another trial."

The Attorney-General contends that appellant has not complied with rules three and twenty-two of this court,

and is, therefore, not entitled to have said questions

1. considered or determined on this appeal. Said rule three requires, among other things, that "where the evidence is set out by deposition or otherwise [in the record], the name of each witness and whether the examination is direct, cross, or redirect, shall be stated on the margin of each page, * * * and shall prepare an index referring to the initial page of the direct, cross and re-examination of each witness." Said rule twenty-two requires that "the brief of appellant shall contain a short and clear statement disclosing: * * * Third. How the issues were decided and what the judgment or decree was. Fourth. The errors relied upon for a reversal. Fifth. A concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript." Appellant has wholly failed to comply with the parts of said rules above set out, or any of them, nor has he made any attempt to do so. The Attorney-General's brief, objecting to the consideration of

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said questions on account of appellant's failure to comply with said rules, was filed the 24th of last January, but appellant has for more than four months ignored the same and has taken no steps to comply therewith. It has been uniformly held that when a party fails to comply with the requirements of said rules, or any of them, that he waives the error if any was committed. *Ewbank's Manual*, §§118, 119, 182, and cases cited; *Elliott, App. Proc.*, §440; *City of South Bend v. Turner* (1904), 163 Ind. 194-196, and cases cited; *Chicago, etc., R. Co. v. Wysor Land Co.* (1904), 163 Ind. 288, 293, 294, and authorities cited; *McElwaine-Richards Co. v. Wall* (1902), 159 Ind. 557, 559; *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489, 498; *Buehner Chair Co. v. Feulner* (1905), 164 Ind. 368, 375; *Penn Mut. Life Ins. Co. v. Norcross* (1904), 163 Ind. 379; *Schreiber v. Worm* (1904), 164 Ind. 7; *Welch v. State, ex rel.* (1905), 164 Ind. 104, 107, 108; *Garrigue v. Kellar* (1905), 164 Ind. 676, 687, 69 L. R. A. 870; *Wolverton v. Wolverton* (1904), 163 Ind. 26, 29, 30. It

follows that there are no questions presented for

2. our determination. As the year allowed for taking an appeal from the judgment of the court below has not expired, we have concluded to dismiss this appeal instead of affirming the judgment.

Appeal dismissed.

 INDIANA UNION TRACTION COMPANY v. JACOBS.

[No. 20,873. Filed June 27, 1906.]

1. **PLEADING.—Complaint.—Negligence.—Interurban Railroads.—Carriers.**—A complaint showing that defendant interurban railroad company negligently failed to provide a platform in the street on which passengers could alight, negligently failed to stop its car at the usual place, and negligently carried plaintiff beyond the usual stopping place and caused her to get off, unassisted, in the dark where the ground was very uneven, by

167	85
167	209
168	159

167	85
169	505

167	85
171	447
171	700

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reason of which, in alighting, she fell and injured herself, is sufficient, though negligence in the failure to provide a platform in the street and in running the car beyond the usual place is not shown. p. 88.

2. **PLEADING.—Carriers.—Interurban Railroads.—Defective Place for Alighting.—Notice.**—A complaint by a passenger against an interurban railroad company for injuries received in alighting at a defective place need not allege notice of such defect on the part of such company. p. 88.
3. **INTERURBAN RAILROADS.—Carriers.—Defective Place for Alighting.—Negligence.—Question for Jury.**—Whether an elderly woman was guilty of contributory negligence in alighting, unassisted, from an interurban car on a dark night at a defective place, of which defects she had an imperfect knowledge, is a question for the jury. p. 89.
4. **PLEADING.—Negligence.—Special Damages.—Aggravation of Existing Condition.**—The aggravation of an existing condition is not considered as special damages; and evidence thereof is admissible under a comprehensive allegation of general damages. p. 91.
5. **EVIDENCE.—Expert.—Hypothesis.—Failure to Show Basis of Facts.—Striking Out.**—Where expert evidence is admitted to prove probable resulting injuries, certain conditions being hypothetically assumed, plaintiff's counsel agreeing to show such conditions, no question can be raised on the introduction of such evidence, on plaintiff's failure to prove such hypothetical conditions, unless defendant at the close of plaintiff's case, moves to strike out such evidence. p. 91.
6. **SAME.—Declarations of Patient to Physician.**—The declarations of a patient to her physician concerning her injuries are admissible, in her behalf, in an action of damages for such injuries. p. 92.
7. **SAME.—Interurban Railroads.—Owner and Operator of.**—Evidence by an employe that he was in the employ of the defendant and in charge of the car on which plaintiff was a passenger when injured, sufficiently shows that defendant was operating such car, especially when defendant was contesting the case upon its merits. p. 92.
8. **TRIAL.—Instructions.—Invited Error.**—Where instructions were given at defendant's request inviting an erroneous instruction by the court, defendant cannot complain. p. 93.
9. **SAME.—Instructions.—Contributory Negligence.—Failure to Mention in Each Instruction.**—Where the jury has been fully and carefully instructed on the question of contributory negligence, it is not necessary for the court to mention such question in the instructions relating to other branches of the case. p. 93.

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10. TRIAL.—*Instructions.—When Reversible.*—Error in the giving of instructions is not reversible unless the jury was thereby misled. p. 94.
11. SAME.—*Instructions.—Negligence.—Contributory.*—Because negligence and contributory negligence may be questions of law for the courts under certain circumstances, it does not follow that an instruction thereon to the jury is necessarily erroneous. p. 94.
12. SAME.—*Instructions.—Hypothesis.—Omission of Fact from.*—The omission of one fact from a hypothesis relative to negligence in an instruction is not necessarily misleading. p. 95.
13. SAME.—*Instructions.—Contributory Negligence.*—An instruction that if plaintiff was acting in a careful and prudent manner she was not guilty of contributory negligence, is correct so far as it goes. p. 95.
14. NEGLIGENCE.—*Contributory.—Volenti non fit Injuria.*—A woman stepping from an interurban car at night, unable to distinguish plainly the defective place of alighting, and who exercises ordinary care therein, is not *volens* to such defective place. p. 95.
15. INTERURBAN RAILROADS.—*Place of Alighting.—Presumptions.*—In the absence of notice to the contrary, a passenger has the right to assume that the carrier has stopped at a place where, with due care, she can alight with safety. p. 95.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Charlotte Jacobs against the Indiana Union Traction Company. From a judgment on a verdict for plaintiff for \$550, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.* .

Kittinger & Diven, James A. Van Osdol and Patrick J. Casey, for appellant.

Gavin & Davis and Gentry & Cloe, for appellee.

GILLETT, J.—Suit by appellee against appellant for injuries received by her while attempting to alight from appellant's interurban car, in a public street in the town of Arcadia. Appellant was defeated below, and assigns as error the overruling of its demurrer to the complaint, and the overruling of its motion for a new trial.

The charges of negligence in said complaint are as follows: "That said defendant negligently and carelessly failed to provide a platform or other safe and con-

1. venient place and means of entering and leaving said car, at the point where said car was stopped by said defendant, for said plaintiff to alight from said car, and that said defendant negligently and carelessly failed to stop said car at the usual place provided by said defendant at said town of Arcadia for passengers to enter upon and leave said cars, and negligently and carelessly ran said car beyond said usual place for stopping the same, for receiving and discharging passengers, to a point where there was a distance, namely, three or three and one-half feet from the lowest step on said car to the ground, and where said ground was uneven and unfit as a place for passengers to alight from said car; and negligently and carelessly informed said plaintiff at the point said car was stopped that she had arrived at her destination where she was to leave the car at said point, and said defendant negligently and carelessly failed to assist her in alighting from said car." It is alleged that it was dark at the time; that plaintiff supposed that the car was standing at the usual place for discharging passengers; that she did not know that the distance was so great, and that she believed that she could safely alight.

In respect to the failure to provide a platform in the street, and running the car beyond the usual place, the complaint fails to disclose a cause of action, but the remaining allegations, taken together, make a sufficient showing of negligence. It is not alleged that the defendant caused the street to be defective, and it is urged that the complaint is insufficient because of the failure to aver knowl-

2. edge, actual or constructive, on the part of appellant of said condition. If this were a suit against the municipality, the case being one of omission, the objection

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would be well taken, as knowledge in such a case is a constituent element in the duty owing. But in a case like this, where the facts disclose a direct and immediate duty to carry safely, growing out of the relation of carrier and passenger, we are of opinion that it is permissible to charge negligence in general terms. *Turner v. City of Indianapolis* (1884), 96 Ind. 51; *Town of Spiceland v. Alier* (1884), 98 Ind. 467; *Cleveland, etc., R. Co. v. Wynant* (1885), 100 Ind. 160; *Pittsburgh, etc., R. Co. v. Adams* (1886), 105 Ind. 151; *Wabash R. Co. v. DeHart* (1903), 32 Ind. App. 62; note to *King v. Oregon, etc., R. Co.* (1898), 59 L. R. A. 209.

It is contended by counsel for appellant that appellee was guilty of contributory negligence. It appears from the evidence that on March 23, 1904, appellee took

3. passage on one of appellant's interurban cars for her home in the town of Arcadia. The car was a limited one, and it arrived at Arcadia as it was growing dark. The conductor announced the town as the car approached appellee's destination. The car did not stop at the intersection of Main street, where appellee might have alighted in safety, but it stopped a few feet beyond. At this point appellant had made a considerable excavation, for the purpose of putting gravel under its ties, with the result that the roadway was in such a condition that for a passenger to alight at said point he would be required to step down from thirty to thirty-six inches. Appellee resided on the street occupied by appellant's tracks, about one block from Main street. She admitted that she knew that the street had been torn up for some months by the building of the railroad, but she testified that for some months she had not been near the point where the car stopped, except as she went away that morning, and that she had not paid any attention to conditions there. She further testified that she noticed that morning that the roadway was

uneven, but she did not know that the railroad had not been completed or that the track had not been ballasted. She was fifty-eight years of age, and her eyesight, while as good as that of most persons of her age, had failed somewhat, so that she had to wear glasses, but she was still able to pursue her vocation, which was that of a seamstress. Her left foot was not as supple as the other, owing, as she testified, to the fact that the toes of her left foot had not fully developed, and this caused her to walk with a perceptible limp. There was no one present to assist her in alighting, and in stepping down, with her left foot first, she lost her balance and fell to the ground, owing to the fact that she misjudged the distance. There were lights burning dimly in the car, and as appellee came out on the platform it seemed dark to her. She testified: "I looked, and the distance seemed great to me. It appeared like it might be a foot and a half, perhaps two feet. I am not very accurate in determining distances, but I thought by being careful—I was not in a hurry about getting off—by being careful that I could get down without any trouble. * * * I looked and hesitated. Looked up and down the track to see if there was any one to assist me. I looked again, and it seemed nearer to me than when I first looked down. The ground seemed to be closer when I looked again." She further testified that she did not hurry, and that she thought by being careful she could get down without any trouble. We have no doubt, in the circumstances of this case, that the question whether appellee was guilty of contributory negligence was for the jury. It is unnecessary to enter into a discussion of the subject, for the authorities settle the question. *Buehner Chair Co. v. Feulner* (1905), 164 Ind. 368, and cases cited; *Pennsylvania Co. v. Marion* (1890), 123 Ind. 415, 7 L. R. A. 687, 18 Am. St. 330. And see, particularly, *Town of Albion v. Hetrick* (1883), 90 Ind. 545, 46 Am. Rep. 230.

Appellant complains of a ruling of the court whereby appellee was permitted to show by her physician that if a woman who had been afflicted with rupture, but

4. which had been cured, should receive a fall, in alighting from a street car, which seriously injured her ankle and strained her back, and the injury was followed by pains in the back, such injury would have a tendency to aggravate the old malady with which she had been afflicted. While there is no averment in the complaint of an aggravation of a former malady, the allegations of the complaint, which are very comprehensive, are quite sufficient to admit evidence of such fact. Aggravation of an existing condition is not regarded, at least in this State, as special damages, and it is clear that under the comprehensive allegations of injury, which the complaint in this case contains, the proof was within the issues. *Ohio, etc., R. Co. v. Hecht* (1883), 115 Ind. 443; *Morgan v. Kendall* (1890), 124 Ind. 454, 9 L. R. A. 445; *Heltonville Mfg. Co. v. Fields* (1894), 138 Ind. 58. It is urged that at the time the hypothetical question was asked the existence of the facts sustaining the hypothesis had not been

5. shown. The evidence was received on the undertaking of appellee's counsel to follow up the question by proof of the facts. It appears to us that subsequently the facts were all testified to by appellee, but in any event the question could only have been saved by a motion, made after she had rested her case, to strike out the answer.

Appellant is in error in the assertion that there was no proof of a stiffening of appellee's fingers as a result of the breaking of her grasp on the hand-rail, and therefore the objection that these facts, which formed the basis of a further hypothetical question, were not proved, is not well taken.

Appellee's attending physician testified that on the night in question he attended upon her professionally. Being

asked to describe her condition, he answered: "I found her in bed. She told me that she had an injured limb, an injured ankle." Appellant moved to strike out the witness's answer as to what appellee said, and the overruling of this motion was assigned as a ground for a new trial. The declaration was evidently but introductory to the witness's treatment of the case, and it was made to one who was competent to judge whether it was false. Such statements are not regarded by the courts as resting on the plane of hearsay. *Town of Elkhart v. Ritter* (1879), 66 Ind. 136; *Cleveland, etc., R. Co. v. Newell* (1885), 104 Ind. 264, 54 Am. Rep. 312; *Hewitt v. Eisenbart* (1893), 36 Neb. 794, 55 N. W. 252; *Stewart v. Everts* (1890), 76 Wis. 35, 44 N. W. 1092, 20 Am. St. 17; *Chapin v. Inhabitants, etc.* (1857), 9 Gray 244, 69 Am. Dec. 281; *Lush v. McDaniel* (1852), 13 Ired. 485, 57 Am. Dec. 566; *Quaife v. Chicago, etc., R. Co.* (1880), 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821.

A number of minor points are made concerning rulings in appellee's favor relative to the admission of testimony offered by her. Without extending this opinion to discuss the rulings complained of in detail, we have to say that we are of opinion that appellant has no serious ground of complaint with reference to any of these, and that in no instance is there shown to be a ground of reversal growing out of a ruling on the evidence.

It is contended that it is not shown that the car was operated by appellant, the Indiana Union Traction Company. There is no evidence to the contrary, and, as

7. the company was defending, we are of opinion that the jury was justified in concluding that that fact existed upon very slight implications. There was at least some evidence that appellant owned said road, and was operating cars thereon. It appeared from the evidence of appellee that she made the trip from Tipton to Arcadia, arriving at the latter place about 7 o'clock in the evening,

and a witness for appellant testified that he was in the "employ of the defendant, the Indiana Union Traction Company, on March 23, 1904," and that he was "in charge of the defendant's car that made the run from Tipton, arriving at Arcadia about 7 o'clock in the evening." Upon this state of the evidence we are of opinion that the jury, in the absence of anything to create the slightest implication to the contrary, was justified in finding that the car was operated by appellant, as charged in the complaint.

Complaint is made that the court instructed the jury that the plaintiff was not required to prove all of the acts of negligence alleged, but that it was sufficient if

8. she proved any act of negligence charged in her complaint as the proximate cause of her injuries. The objection which is urged to this instruction is that in some particulars the acts complained of by appellee did not constitute negligence. It appears to us, however, that by instruction seven, tendered by appellant and given by the court, the error was invited. Elliott, App. Proc., §627; Ewbank's Manual, §255.

A reversal is sought because the court in an instruction to the jury, after referring to the issues, stated that "if the plaintiff had so proved the material allegations of

9. her complaint, then she is entitled to recover such damages as will compensate her for the injuries." The objection urged to this instruction is that it ignores the element of contributory negligence. The jury was charged with great distinctness that contributory negligence would defeat a recovery, and that while the burden of proving such negligence was on the defendant, yet that such defense might be made out by the evidence of the plaintiff and her witnesses with the same effect as if made by the witnesses of the defendant. Five instructions were given which referred to the subject of contributory negligence, and four were given relative to the subject of ordinary care being exercised by the plaintiff. The sixth, seventh and

ninth instructions given by the court, which were framed on lines not essentially different from the instruction complained of, were qualified by the statement that the plaintiff, upon proving the facts referred to in such instructions, was entitled to recover, unless the defendant had proved by a preponderance of evidence some act of negligence on her part contributing to her injuries. Upon a review of the instructions on the subject of contributory negligence we are impressed with the view that the jury was over-instructed upon that subject, and it is our conclusion that the jury could not have been misled by said instruction. It was really correct as far as it went, as it really but amounted to a statement that "then," that is, upon proving the facts alleged in her complaint, she was entitled to a recovery as the evidence then stood. The qualifying clause ought in strictness to have been added immediately thereafter, so as to guard against the possibility that the jury would misapprehend the effect of the instruction; but, presuming that the jury exercised common sense, we cannot indulge in the supposition that the jurors were not mindful of the abundant instructions which they received on the subject of contributory negligence, or that they failed to perceive that in three other instances the qualifying clause was added. A cause ought not to be reversed merely

10. because an instruction is obnoxious to verbal criticism. The test question in every case is: Was the jury misled? *Cleveland, etc., R. Co. v. Miller* (1905), 165 Ind. 381. In the circumstances of this case, we are of opinion that the giving of said instruction did not constitute error.

Negligence and contributory negligence, under a particular state of facts, may be questions for the courts, and as an abstract proposition it cannot be affirmed that

11. because the court instructs on that subject its action is erroneous. Appellant's counsel have failed to point out, either in their statement of points and authori-

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ties or in their argument, wherein the court erred in instructing upon these subjects. It does not neces-

12. sarily follow that by the omission of some fact in an instruction involving a hypothesis relative to negligence, the instruction becomes misleading. Wherein the jury might have been misled in this particular has not been indicated. Appellant has no cause of complaint that

the court instructed that if the plaintiff was acting

13. in a careful and prudent manner she was not guilty of contributory negligence. Such an instruction is

correct as far as it goes. One of the instructions, concerning which no specific objection has been pointed out, might seem, if standing alone, to overlook the subject of

14. assumed risk (a different thing from contributory negligence; see *Indiana, etc., Oil Co. v. O'Brien* [1903], 160 Ind. 266); but, bearing in mind that the only testimony upon the subject of the appearances, as they presented themselves to appellee, fell from her own lips, and that her testimony strongly tended to negative the idea that she voluntarily cast herself upon a known and appreciated danger, there appears to be no substantial reason for supposing that the instruction was prejudicial.

The first part of appellant's instruction twelve, which was refused, correctly stated that in certain circumstances the plaintiff had a right to remain on the car, but as

15. the latter part of the instruction, which deals with the subject of assumed risk, was not limited to the facts stated in the first part of the instruction, we are of opinion that it was properly refused. Appellant's instruction thirteen was not proper, as appellee had a right to assume, in the absence of notice to the contrary, that appellant had stopped its car at a place where, by the exercise of due care, she might alight in safety.

Judgment affirmed.

THE STATE v. THOMSON.

[No. 20,729. Filed June 28, 1906.]

1. APPEAL AND ERROR.—*Original Bill of Exceptions.—Precipe.—Criminal Law.*—The original bill of exceptions in a criminal case is not a part of the record on appeal, where the precipe calls only for a transcript thereof. p. 97.
2. SAME.—*Bill of Exceptions.—Original.—Transcript.—Precipe.—Statutes.*—The act of 1903 (Acts 1903, p. 338, §7), providing that the clerk may certify the original bill of exceptions instead of a transcript, though the precipe calls for a transcript, does not apply to criminal cases. p. 97.
3. SAME.—*Bill of Exceptions.—Original.—Transcript.—Precipe.—Statutes.*—The act of 1905 (Acts 1905, pp. 584, 648, §289), providing that in appeals in criminal cases the original bill of exceptions may be included in a transcript, instead of a transcript thereof, as requested by the precipe, does not apply to a cause commenced before the taking effect of such act. p. 98.

From Pike Circuit Court; *E. A. Ely*, Judge.

Prosecution by the State of Indiana against Charles B. Thomson. From a judgment of acquittal, the State appeals. *Appeal not sustained.*

Charles W. Miller, Attorney-General, *Bomar Traylor* and *Stanley M. Krieg*, for the State.

J. W. Wilson, Dillon & Ely and *S. G. Davenport*, for appellee.

JORDAN, C. J.—On December 17, 1904, an indictment against appellee, Charles B. Thomson, was returned in the Pike Circuit Court by the proper grand jury, charging that said Thomson, on December 2, 1904, at Pike county, Indiana, committed the crime of perjury. To this charge the accused pleaded not guilty, and on a trial by jury a verdict of acquittal was returned and judgment was rendered thereon by the court that he be discharged and go hence without day. From this judgment the State, by its prosecuting attorney, has appealed to this court under §§1915, 1955 Burns 1901, §§1846, 1882 R. S. 1881.

The rulings upon which the errors assigned are predicated relate to the exclusion of certain evidence offered by the State. It is claimed by its counsel that this

1. evidence, together with the rulings of the court thereon and the exceptions reserved thereto, is exhibited by the original bill of exceptions which has been certified up by the clerk of the lower court, instead of a transcript thereof.

It appears that the prosecuting attorney made and filed with the clerk below a precept for a transcript. This precept is attached to and made a part of the clerk's certificate to the record herein. By this precept the clerk was requested and directed to prepare and "certify a full, true and complete transcript of the proceedings, papers on file and the judgment" in the cause, "to be used on appeal to the Supreme Court." The precept in no manner directed or requested the clerk to certify the original bill of exceptions. We are met with the contention of counsel for appellee that because the clerk has certified up the original bill of exceptions instead of a transcript thereof as directed, said original bill cannot be considered as a part of the record in this appeal. We have repeatedly held that in appeals to this court, where the precept made by the party taking the appeal calls for a transcript of the proceedings or record, etc., and that thereupon the clerk certifies up the original bill of exceptions, instead of the transcript as requested, such original bill does not, under the circumstances, become a part of the record and therefore cannot be considered. *Boos v. Lang* (1904), 163 Ind. 445, and the numerous cases cited on page 448.

The provisions of section seven of an act concerning civil procedure, approved March 9, 1903 (Acts 1903, p. 338, §641g Burns 1905), are not available to

2. authorize us in this appeal to consider or regard the original bill of exceptions as a part of the record, because the provisions of that statute are confined to pro-

cedure in civil causes and have no application to a criminal case.

It is also true that §289 of an act of the legislature "concerning public offenses," approved March 10, 1905 (Acts 1905, p. 584, §1930 Burns 1905), provides that

3. "in case an original bill of exceptions shall be incorporated into the transcript of the record of any case on appeal, such original bill shall, in every case, constitute a part of such transcript, as if copied therein by the clerk, whether such original bill or copy thereof, be specified in the precipe or otherwise directed to be incorporated in such transcript." This provision, however, does not apply to or control in criminal prosecutions commenced, as in this case, prior to the taking effect of said act of 1905. *Miller v. State* (1905), 165 Ind. 566; *Stieler v. State* (1906), 166 Ind. 548.

For the reasons stated we hold that the original bill of exceptions as certified in this appeal cannot be considered or regarded as part of the record. The evidence in question and the rulings of the trial court in excluding it, and the exceptions reserved, are, therefore, not presented by the record, and the appeal cannot be considered on its merits.

Appeal not sustained.

HUBER MANUFACTURING COMPANY v. WAGNER.

[No. 20,871. Filed June 28, 1906.]

1. **APPEAL AND ERROR.**—*Supreme Court Rules.*—*Briefs.*—Appellant's brief will not be disregarded where a good-faith attempt has been made to comply with the Supreme Court rules and enough of the record has been set out to present the questions raised. p. 99.
2. **CONTRACTS.**—*Execution of.*—*Order for Engine.*—An order for an engine, signed by the agent of the manufacturers thereof, but not by plaintiff, though it specifies that when it is accepted at the home office it becomes a binding contract, is not a contract on the part of plaintiff, though such order was accepted and ratified by defendant. p. 100.

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3. PLEADING. — *Complaint.* — *Exhibits.* — *Variation.* — Where the contract set out as an exhibit varies from the contract as alleged in the body of the complaint, the exhibit controls. p. 100.

From Huntington Circuit Court; *James C. Branyan*, Judge.

Action by Henry R. Wagner against the Huber Manufacturing Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

Lesh & Lesh, for appellant.

Fred H. Bowers and *Milo Feightner*, for appellee.

MONKS, J.—Appellee brought this action to recover damages for breach of an alleged written contract for the purchase of a gasoline engine from the appellant. Appellant's demurrer for want of facts to the complaint was overruled. A jury trial resulted in a verdict and judgment in favor of appellee.

The action of the court in overruling the demurrer to the complaint is called in question by the assignment of errors. Appellee claims that appellant has waived

1. said alleged error by failing to set out in its brief a copy or concise statement of the written instrument sued upon, which was made a part of the complaint as required by §365 Burns 1901, §362 R. S. 1881. The written instrument is not set out to the extent required by the rules of court; but as appellant has made a good-faith effort to comply with the rules, and the parts, which appellant claims show the insufficiency of the complaint, are stated in the brief, the defects suggested will be disregarded.

It was alleged in the complaint that appellant, by its authorized general agent, C. S. Cooper, agreed to sell and deliver to appellee one fourteen-horse-power gasoline engine at Huntington or Warren, in consideration of which appellee agreed to execute and deliver to appellant his promis-

sory notes for \$250, said notes to be secured by chattel mortgage, and to deliver to appellant one steam engine; that appellant accepted and ratified said agreement, a copy of which is filed with and made a part of the complaint.

The writing sued upon purports to be and is a mere order or request to appellant for a "fourteen-horse-power gasoline engine." Near the bottom

2. of the order, under the title "notice," is the following: "This order is subject to the acceptance and approval of said company at its home office, and when so approved and accepted is a binding contract which no person has authority to modify or vary in any respect, or to waive any of its conditions except in writing approved by the management at the home office, and any attempt otherwise to change any of the terms or waive any of the conditions of the warranty will not be binding on the company." The only signature to the order is: "C. S. Cooper, agent. The Huber Company." According to its terms said order was not a contract, but a mere request to appellant, which, according to its terms, could only become a contract when accepted by the appellant at the home office. Said order was not signed by appellee. It was not his order, but, as signed, was the order of "C. S. Cooper, agent. The Huber Company." Said order, even if accepted and ratified by appellant, as alleged in the complaint, would not be a contract with appellee, as alleged in the complaint.

It is evident that the allegations of the complaint in regard to the instrument sued upon vary from the provisions of said instrument. In such case the exhibit

3. controls, and such allegations will be disregarded.

Harrison Bldg., etc., Co. v. Lackey (1897), 149 Ind. 10, 14, and cases cited.

Disregarding the allegations of the complaint which vary from the provisions of the instrument sued upon, it is evident that the court erred in overruling appellant's demurrer thereto.

Other questions are argued in the briefs, but the conclusion we have reached renders their determination unnecessary.

Judgment reversed, with an instruction* to sustain the demurrer to the complaint.

HEASTON, EXECUTOR, ET AL. v. KRIEG.

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171	457

[No. 20,504. Filed April 27, 1906. Rehearing denied June 28, 1906.]

1. **APPEAL AND ERROR.**—*Complaint.*—*Exhibits.*—*Estoppel.*—*Wills.*—*Contest.*—Where the contestant of a probated will is required, by an order of the court entered upon the contestees' motion, to make an exhibit of a former testator's will, they are estopped on appeal from maintaining that such will is not a part of the complaint. p. 107.
2. **PLEADING.**—*Complaint.*—*Exhibits.*—*Wills.*—*Probate.*—*Contest.*—*Substitution of Another.*—A subsequent will is a proper exhibit to a complaint to set aside and annul the probate of a prior will, where the plaintiff asks also that such subsequent will be admitted to probate. p. 107.
3. **WILLS.**—*Probate.*—*Setting Aside.*—*Establishing Another in Same Action.*—A devisee and legatee under a subsequent will may contest a prior probated will and propound such subsequent will for probate in the same action. p. 108.
4. **PLEADING.**—*Complaint.*—*Exhibits.*—*Wills.*—*Probate.*—Under §365 Burns 1901, §362 R. S. 1881, providing that where an action is founded upon a written instrument, such instrument or a copy thereof must be filed with the complaint, a will sought to be probated must be set out in the complaint or made an exhibit thereto. p. 108.
5. **WILLS.**—*Time of Taking Effect.*—A will takes effect at the death of the testator. p. 108.
6. **SAME.**—*Conditions.*—*Implied.*—Ordinarily, the courts will not construe the performance of certain things mentioned in a will to be performed by a legatee as a condition to the taking effect of the legacy, such testator having a complete remedy at all times by revocation. p. 109.
7. **SAME.**—*Conditions.*—*Care and Support.*—*Consideration.*—*Contracts.*—A will reciting that in consideration of love and affection and the legatee's taking care of and supporting testator during the remainder of her life, certain property is be-

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- queathed to such legatee, is not necessarily upon a condition subsequent, since the condition of care and support does not go to the whole consideration. p. 109.
8. **WILLS.—Conditions.—Intention.**—Conditions in a will are not favored, and unless expressly stated or clearly intended, they will not be implied. p. 109.
9. **SAME.—Sustaining.—Construction.**—Courts will sustain a properly executed will where the intent is clear, if it can consistently with the rules of law. p. 109.
10. **PLEADING.—Complaint.—Exhibits.—Wills.—Contest.**—A husband's will is not a proper exhibit to a complaint by the legatee of a subsequent will by the wife to set aside the probate of her prior will and establish such subsequent will, and a want of power of disposition by contract as shown therein, cannot be considered on demurrer to such complaint. p. 110.
11. **WILLS.—What Are.—Statutes.**—Prior to the statute of wills of 1837 (1 Vict. c. 26) almost any kind of a testamentary document disposing of or affecting property was entitled to probate. p. 110.
12. **SAME.—Definition.**—A will is an instrument executed with the formalities required by law, whereby the testator makes a disposition of property to take effect at his death. p. 111.
13. **SAME.—Provisions.—Contracts.**—It is not fatal to a will as such that it contains provisions of a contractual nature. p. 111.
14. **SAME.—Provisions.—Contracts.—Probate.**—A document of a contractual and also of a testamentary character cannot grant a present interest in, and at the same time bequeath, the same property; but such document may be probated as a will when it contains a devise or bequest, if it be properly executed as a will. p. 111.
15. **SAME.—Animus Testandi.—Parol Evidence.**—A document stating that in addition to certain property "there shall be paid to" plaintiff "at the death of" testator "the whole of the residue of the estate, real, personal and mixed, of which she shall die seized" shows an *animus testandi*, parol evidence being unnecessary to establish same. p. 112.
16. **WORDS AND PHRASES.—"Paid."**—The word "paid" is often loosely used and is always liberally construed. p. 112.
17. **WILLS.—Property Conveyed.—Deeds.—Description.**—A document, executed with the formalities of a will, giving to plaintiff at decedent's death all of the property of which she shall "die seized," cannot operate as a conveyance *in presenti*, since it is void for such purpose for want of description. p. 113.
18. **SAME.—Contracts.—Care and Support.—Conditions Subsequent.**—Where testator agreed to bequeath plaintiff, in consid-

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eration of care and support, all the property of which testator might "die seized," and testator refused to live with plaintiff, the plaintiff cannot recover such property at testator's death. p. 113.

19. **WILLS.—Future Wills.—Provision against Making.—Contracts.—Testamentary.**—A writing, executed by an elderly widow, in the form of a will, purporting to give to plaintiff certain property absolutely, as well as certain other property of which she might "die seized," on plaintiff's performance of certain services, and providing that the same shall supersede any will theretofore or thereafter executed, and further providing certain legacies to others, is testamentary, the testator still having the power of transfer *inter vivos*. p. 113.
20. **SAME.—Animus Testandi.—Parol Evidence.**—A document, properly executed as a will and incapable of operating in any other way, will be treated as testamentary, the *animus testandi* being necessarily implied, parol evidence to overthrow such intent being inadmissible. p. 114.
21. **SAME.—Conveyances.—Construction.**—Where a document is capable of being construed as a will and of a conveyance *in presenti*, the latter of which constructions nullifies the document, it will be construed as a will, thereby sustaining same. p. 114.
22. **DEEDS.—Lease and Release.—Statute of Uses.—Constructions.**—A deed of lease and release attempting to convey a freehold *in futuro* will be upheld as a covenant to stand seized, thus making it effectual under the statute of uses, though such deed was void at the common law. p. 115.
23. **SAME.—Wills.—Construction.**—Where an instrument intended as a will cannot operate as such, it will be upheld as a deed if possible; and *vice versa*. p. 115.
24. **WILLS.—Powers.—Express.—Implied.**—Where the widow was given power to dispose of one-half of her husband's estate by his will, her disposition thereof in the prescribed manner is valid whether her will refers to the power contained in her husband's will or not, such intent being implied from the act. p. 117.
25. **WITNESSES. — Competency. — Waiver. — Evidence. — Wills. — Executors and Administrators.—Legatees.**—In an action to set aside the probate of a prior will, and to probate therefor a subsequent will, the physician of the testator is incompetent, over the objections of the legatee of such subsequent will, to testify to things learned in his professional capacity, though the executor of the prior will expressly waived any objections to such competency. p. 117.

26. **EVIDENCE.**—*Declarations of Plaintiff's Husband.*—*Wills.*—*Contest.*—*Undue Influence.*—It is not erroneous to exclude evidence of declarations of plaintiff's husband tending to show undue influence in a will contest where the evidence on such question is not sufficient to warrant a submission of such question to the jury. p. 119.
27. **NEW TRIAL.**—*Causes for.*—*Joint Assignment.*—*Evidence.*—Where error is predicated, in a motion for a new trial, jointly on a number of rulings of the court on questions to a witness and answers thereto, such error is not well taken unless all of such rulings are bad. p. 119.
28. **EVIDENCE.**—*Opinions.*—*Insanity.*—*Lay Witnesses.*—Lay witnesses, after testifying to the facts of their relationship with testatrix, may upon such facts as a basis state their opinion as to her sanity or insanity. p. 120.
29. **NEW TRIAL.**—*Instructions.*—*Joint Assignment.*—Error jointly assigned as to a number of instructions in the motion for a new trial, is not availing unless all of such instructions are bad. p. 120.
30. **TRIAL.**—*Wills.*—*Probate.*—*Subsequent Wills.*—*Burden of Proof.*—Formal proof of a subsequent will is all that is necessary on the part of plaintiff where she is attempting to set aside the probate of a prior will and to probate a subsequent one, the burden of showing such subsequent will to be invalid being upon defendants. p. 121.

From Huntington Circuit Court; *Levi Mock*, Special Judge.

Suit by Emma L. Krieg against John Heaston, as executor of the will of Esther McGlinn, deceased, and others. From a decree for plaintiff, defendants appeal. *Affirmed.*

Cline, Eberhart & Cline and *Kenner, Lucas & Kenner*, for appellants.

Lesh & Lesh and *Branyan & Feightner*, for appellee.

GILLET, C. J.—Appellee instituted this action against John Heaston, as executor of the probated will of Esther McGlinn, deceased, and the persons named as devisees and legatees under said instrument, to contest the validity of such will and to probate in its stead an alleged subsequent will of said decedent. The document assailed bore date of April 30, 1903, and the later writing, under which appel-

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lee claimed as a legatee, was signed September 1, 1903. The action resulted in a judgment revoking the probate of said former instrument and establishing as the last will and testament of said decedent the writing brought forward by appellee.

As the complaint appears in the record, there are two exhibits attached, one of which was a copy of the writing last mentioned and the other a copy of the will of John McGlinn, the deceased husband of said Esther. The exhibit of the alleged will of which appellee was the proponent is in the words and figures following, viz.:

“CONTRACT.

This agreement is entered into by and between Esther McGlinn, of Huntington county, Indiana, and Emma L. Krieg, of Huntington county, Indiana, party of the second part, and its provisions are as follows, to wit:

(1) Said party of the second part, Emma L. Krieg, is to take care of the first party, Esther McGlinn, during the balance of her natural life, including boarding, lodging, washing, furnish her with all reasonable and necessary wearing apparel, medical attendance, and nurse her in sickness as required, and furnish and do all such things as may be reasonably required for her comfort and support during her remaining years, said home to be furnished in Huntington, Indiana, the free use of the property on East Franklin street where said parties now reside being permitted for said purpose, as well as a residence for the other members of the family of the second party.

(2) In consideration of the things to be done and furnished by said Emma L. Krieg, for and on behalf of said Esther McGlinn, and also the love and affection which each of said parties has for the other, said Esther McGlinn is to convey, by proper deed of conveyance to said Emma L. Krieg, the undivided one-half interest in lot No. 133 in the original plat of the city of Huntington, Indiana, in addition to which there shall be paid to said Emma L. Krieg, at the

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death of said Esther McGlinn, the whole of the residue of the estate, real, personal and mixed, of which she shall die seized, after deducting the following, to wit:

(a) The undivided one-half of said estate which is to go to the brothers, sisters, and descendants of said John McGlinn, deceased, by the provisions of item one of his will, which provisions are to be carried out.

(b) There shall also be deducted from the residue of the estate the sum of \$200 to be paid to John M. Krieg and a like sum—\$200—to be paid to Esther Ellen Bailey. All the remainder, however, shall be paid by the legal representative or representatives of my estate to said Emma L. Krieg.

(3) The provisions of this instrument being required for the comfortable and reasonable support of said Esther McGlinn, the same are to supersede any and all wills or codicils which have been or may hereafter be made by her.

Witness our hands this 1st day of September, 1903.

Esther McGlinn.

Emma L. Krieg.

This instrument was signed by the parties thereto in our presence and signed by us in their presence, this 1st day of September, 1903.

U. S. Lesh,
Eben Lesh."

The will of said John McGlinn, according to the copy thereof which is made an exhibit to the complaint, gave to his wife all of his property for and during her natural life, and, in the following language, it gave her authority to dispose of the same:

"I do hereby authorize her, with advice of my executors hereafter named, to sell and with said executors to execute all necessary titles, papers, deed, and contract for whatever portion of said property my said wife may deem necessary for her support and comfort, and with the further power to dispose of the one-half of the residue of surplus if any shall remain at her death by will or executory devise, and I will and direct that the other half of said residue shall be equally divided amongst my brothers and sisters, if living, and if deceased then to their descendants."

The first assignment of error is based on the overruling of a demurrer to the complaint, and the first objection which appellants' counsel make to said pleading is

1. thus stated by them: "The exhibits to the complaint are not parts thereof, and hence Emma L. Krieg is not a party in interest, and cannot legally contest the will of Esther McGlinn." It is alleged in the complaint, among other things, "that on September 1, 1903, said Esther McGlinn duly revoked said alleged will by an instrument in writing, signed by her and attested and subscribed by two competent witnesses, as required by law, a copy of which is hereto attached and made a part hereof and referred to as exhibit A." It is further alleged "that the plaintiff is a foster daughter of said decedent, and by the terms of her last will is named as a legatee, and as such is entitled to maintain this action." The specific relief prayed for is "that the probate of said will be annulled, and that the one herein proposed be admitted to probate in lieu thereof." Appellants admit in their brief that the copy of the will of John McGlinn, deceased, was attached to the complaint by order of the court, on their motion, so, although it is not necessary to meet the objection stated to examine said exhibit, we may say in passing, as applied to other objections urged against the complaint, that appellants, by their conduct, are estopped to deny that the copy of that will is a proper exhibit.

As to the copy of the instrument of September 1, 1903, appellants' counsel cite, as authority for the proposition that said copy is not a proper exhibit, certain decisions

2. of this court to the effect that in an action to contest a will a copy of the instrument in contest cannot properly be attached as an exhibit. These cases are not in point, for the copy in question is the one under which appellee claims; the fact that she made it an exhibit tends to show, as does also the general structure of the complaint, that her effort in part was to procure the probate of said

instrument. She had a right, in the action to contest the earlier will, which she claimed had been revoked

3. by the subsequent instrument, to propound said instrument for probate, if it amounted to a will. So in the strictest sense of the term, it was the foundation of her cause of action. It was not mere evidence of a right; it was her right of action. Her complaint in that respect would not have been good unless she had incorpo-

4. rated the copy in such pleading, or made it an exhibit. The rule of the code (§365 Burns 1901, §362 R. S. 1881) that where a pleading is founded on a written instrument the original or a copy thereof must be filed is imperative, and in this respect the rule of practice in this State is stricter than at common law. *Price v. Grand Rapids, etc., R. Co.* (1859), 13 Ind. 58. It was held in *Watt v. Pittman* (1890), 125 Ind. 168, that there are cases in which it is proper to make an instrument an exhibit although it is not in the strict sense the foundation of the action, as in a complaint to construe a will, and so here, upon the same principle, it would seem that the making of the instrument of revocation an exhibit was authorized, so far as the complaint attacked the former will, to enable the court to determine from the terms of the subsequent instrument—and all of them would have to be examined—whether there was a sufficient revocation of the will in contest.

Appellants' counsel further contend that the writing of September 1, 1903, is conditional, and that therefore appellee ought to have alleged performance upon her

5. part. It is to be observed that the things which appellee was to do according to the terms of said instrument were all to be performed in the lifetime of the decedent, and as the instrument, if a will, continued revocable until her death, no estate passed to which her stipulations could attach, either as conditions precedent or conditions subsequent. That the instrument, at least in part, was a will in law we shall attempt to show hereafter. If

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the document were a deed, under which a title would pass, the protection of the interests of the grantor might incline the court to construe the statement of the agreement to support as a condition, but presumptively a will speaks as of the date of the death of the testator. It is especially un-

likely that in a will a testator, who continues

6. throughout the master of his own discretion, would attempt to protect himself by a condition precedent.

This takes the case out of the range of cases in which conditions have been implied for the want of an effectual remedy in the grantor. *Richter v. Richter* (1887), 111 Ind. 456. Besides, the consideration for the execution of the instrument in question by the decedent is stated

7. to be love and affection, as well as the things promised to be done by the other party, so it would seem, at least if it be assumed that the residuary clause is a will, in which it is presumed that the testator's bounty is an element, that the case comes within the rule that in the absence of express words a condition is not to be implied from the mention of a consideration if it does not go to the whole consideration. 2 Parsons, Contracts (5th ed.), 527; *Duke of St. Albans v. Shore* (1789), 1 H. Bl. 271, and note, p. 273, containing *Boone v. Eyre* (1777), and see latter case in note (t) to *Boone v. Eyre* (1779), 2 W. Bl. *1312, *1314; *Pordage v. Cole* (1607), 1 Wms. Saund. 320; *Ayer v. Emery* (1867), 14 Allen 67; *Gould v. Brown* (1856), 6 Ohio St. 538. Con-

ditions are not favored, and, in the absence of ex-

8. press terms to that effect, they will not be implied in wills unless the intent is clear. *Murphey v. Brown* (1902), 159 Ind. 106. Here, as we shall hereafter show, the provisions concerning the residuary estate can reasonably be disentangled from the other provisions of the instrument, and as it may be satisfied in any event by treating the stipulations of appellee as covenants,

9. or by the assumption that the statement of the portion of the consideration which was valuable was in

the nature of a recital, and indulging, as we may, the presumption that it was really the intention of decedent to make appellee, to a large extent at least, the recipient of her bounty, we deem it clear that we should not treat the provisions concerning support as conditions which were punctiliously to be performed in every particular to avoid a forfeiture.

Appellants' counsel further urge in support of their demurrer that the instrument of September 1, 1903, was a contract, and that, therefore, decedent was not authorized to dispose of the property she received from her deceased husband, by means of such an instrument. As appellee made the copy of the will of John McGlinn an exhibit pursuant to the order of the court, as moved by appellants, and as said will was not a proper exhibit under the code, we are of opinion that the question as to Esther McGlinn's authority to execute said instrument in disposition of the estate is not presented by the demurrer. The question does arise upon the evidence, however, and with the preliminary statements that at the time of the execution of the writing in question said decedent was eighty-two years of age, that she had none but collateral kindred, that the appellee had been reared by decedent, that they had lived together much of the time afterwards, that decedent had received under her husband's will about \$17,000 worth of property, and that she had no further estate, we proceed to the consideration of the law question presented.

It appears from the English authorities prior to the enactment of the English wills act of 1837 (1 Vict. c. 26) that there was judicial sanction for the probating of almost every kind of document whereby property could be disposed of or affected, among which we may enumerate deeds, contracts, promissory notes, bills of exchange, letters, and diary entries. *Castor v. Jones* (1882), 86 Ind. 289, and cases cited; note to *Ferris v.*

Neville (1901), 89 Am. St. 480; note to *Burlington University v. Barrett* (1867), 92 Am. Dec. 376; *Hunt v. Hunt* (1828), 4 N. H. 434, 435, 17 Am. Dec. 438; 30 Am. and Eng. Ency. Law (2d ed.), 573, and cases cited. A will may be defined, with sufficient accuracy for present purposes, as any instrument, executed with the formal-

12. ities required by law, whereby a person makes a disposition of his property to take effect after his death. 1 Redfield, Wills (4th ed.), *5; *Habergham v. Vincent* (1793), 2 Ves., Jr., 204; *McCarty v. Waterman* (1882), 84 Ind. 550; *Robinson v. Brewster* (1892), 140 Ill. 649, 30 N. E. 683, 33 Am. St. 265; *Cover v. Stem* (1887), 67 Md. 449, 10 Atl. 231, 1 Am. St. 406; note to *Ferris v. Neville*, *supra*. It is, of course, essential to distinguish between such provisions and those in which the beneficiary takes some interest, vested or contingent, upon the execution of the instrument. It is of the essence of a testamentary disposition of property that it be purely posthumous in operation, since during life the intent of the testator must continue ambulatory.

It affords no objection whatever to the testamentary character of an instrument that it contains provisions of a contractual nature. *Habergham v. Vincent*, *supra*;

13. *Green v. Proude* (1675), 1 Mod. 117; *Hixon v. Wytham* (1675), 1 Ch. Cas. 248, Finch 195; *Thorold v. Thorold* (1809), 1 Phil. Ecc. 1; *Masterman v. Maberly* (1829), 2 Hagg. Ecc. 235; *Lautenshlager v. Lautenshlager* (1890), 80 Mich. 285, 45 N. W. 147; *Armstrong v. Armstrong* (1874), 4 Baxt. 357; *Jordan v. Jordan* (1880), 65 Ala. 301; *Gage v. Gage* (1841), 12 N. H. 371; *Symmes v. Arnold* (1851), 10 Ga. 506; *Turner v. Scott* (1866), 51 Pa. St. 126. Of course, as respects the same subject-matter, a document could not be a

14. contract, passing an interest in the property, and a will, any more than two objects could occupy the same space at the same time. The very attaching of rights

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in the property by another precludes the exercise of that continued authority upon the part of the original owner which is of the essence of testamentary power. But we think it may be affirmed, as a just deduction from the cases, that no matter by what name the parties may call their agreement, or to what extent there may be contractual provisions in it, yet if a provision of a clearly testamentary character is found in the writing and it is witnessed in accordance with the requirements of law, it may operate as a will. *Habergham v. Vincent, supra*; *Green v. Proude, supra*; *Castor v. Jones, supra*; *Gage v. Gage, supra*; *Reed v. Hazleton* (1887), 37 Kan. 321, 15 Pac. 177; *Turner v. Scott, supra*.

As to the *animus testandi*, concerning which appellants' counsel raise a question, we have to observe that a case in which a testamentary provision clearly appears is

15. to be broadly differentiated from a case arising out of some ambiguous act, as the indorsement of a promissory note. In the former case parol evidence would be wholly unnecessary, for the *animus testandi* does not depend upon the maker's realization that the instrument he is executing is a will, but upon his intention to create a revocable disposition of his property to take effect after his death. *Kenney v. Parks* (1899), 125 Cal. 146, 57 Pac. 772.

In the instrument before us, the provision of item two, commencing with the words, "in addition to which there shall be paid to said Emma L. Krieg, at the death of said Esther McGlinn, the whole of the residue of the estate, real, personal and mixed, of which she shall die seized," clearly looked forward to the death of the latter, and may be given a testamentary operation. The word "paid" is one which is often loosely used, and is always liberally con-

16. strued. *Sheets' Estate* (1866), 52 Pa. St. 257, 258. At the best, appellants' counsel cannot escape the proposition that aside from the interest in the house and lot which decedent undertook to convey by deed, the

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provision that appellee should have at decedent's death the property of which she should "die seized" wholly failed to identify any property as the subject-matter of a conveyance *in presenti*. If decedent had refused to continue to live with appellee, and had, with the advice of her husband's executors, conveyed property to provide for her support, or if, having procured their consent, she had exercised her undoubted discretion to dispose of property to provide herself with comforts which it would have to be said that appellee's undertaking, in view of her scale of living, did not contemplate should be furnished, the latter could not have recovered such property upon decedent's death. We quote as illustrative of the force of this the following observations of the court in *Brewer v. Baxter* (1870), 41 Ga. 212, 5 Am. Rep. 530: "The paper writing set forth in the record, conveys only such of the described property as the maker thereof 'may die possessed of;' no present interest in the property was conveyed to the three sons, and until the death of the maker of the instrument, no one could know what portion of the property described therein he would die possessed of. Consequently, the instrument conveyed only such portion of the described property as he might be possessed of at the time of his death, and is, in law, a testamentary disposition of the property, to take effect at the death of the maker of the instrument, and if legally executed, may be proved as such in the proper court." See, also, *McCarty v. Waterman*, *supra*; *Reed v. Hazleton*, *supra*.

As to the undertaking in item three, whereby decedent undertook to revoke any subsequent will, it may be pertinently asked whether the provision against revocation does not have quite as much tendency to show that the absolute title to the property was treated by the parties as remaining in said decedent as it does to show that an interest was attempted to be conveyed, but, as we have already pointed out, there yet remained a way by

which she could disappoint the expectations of appellee by a conveyance *inter vivos*, so that decedent would not "die seized" of the property. Besides, it is to be remembered, that if said instrument should not be construed as a will, it would work the overthrow of the provisions in favor of John M. Krieg and Esther Ellen Bailey, who could only take as legatees. This reinforces the view that the instrument should be construed as testamentary.

As the writing in question contains every element of a valid will, and was incapable of operating in any other way, we are of opinion that the *animus testandi* must be implied, and that the instrument (supposing that it had been regularly executed) was not subject to be controlled by parol evidence tending to show any different intent. There was evidence, however, from which the jury was justified in finding that the paper was intended as a will.

But supposing that by putting together the various provisions of the writing it could be said that in its entirety it amounted to an expression, even if somewhat incoherent, of an intent to pass an interest in the property, yet, as must be admitted, there is room for the other construction, and the question then arises as to which should prevail. And at this point we may suggest that appellants occupy the peculiarly unfortunate position of contending for a particular interpretation, not for the purpose of substantially carrying out the intention of the parties to the instrument, but to the end that the provisions thereof may be extirpated, root and branch. Now, it is evident, since the decedent had authority to dispose of one-half of her deceased husband's estate by will, that an interpretation which would nullify the instrument, which she caused to be duly witnessed according to the law of wills, is not to be adopted if it can reasonably be avoided. "*Ut res magis valeat quam pereat*"—that the thing may prevail, rather than be destroyed—is a sound rule of construction,

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which is frequently adopted by the courts to effectuate the intention of parties to written instruments. In *Roe v. Tranmarr* (1757), Willes 682, 3 Smith's Lead. Cas. (9 Am. ed.) 1780, a deed which could not operate as a release, because it attempted to convey a freehold *in futuro*,

22. was upheld, by invoking the above rule, as a covenant to stand seized, thus giving the instrument an operation by the statute of uses, although it was intended to be a deed at common law. In delivering the opinion of the court, Willes, Lord Chief Justice, after calling attention to the rules in respect to the exposition of deeds, as laid down in Sheppard's Touchstone, and to the declaration of Lord Hale, that the judges ought to be curious and subtle to invent reasons and means to make acts effectual, according to the just intent of the parties, adds: "The judges in these later times (and I think very rightly) have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it." The learned annotator of Smith's Leading Cases, in his opening comment upon said case, says: "The principle which it carries out, and is usually cited to illustrate, is one of the highest importance, and is indeed the main one upon which the construction of every written instrument hinges."

The doctrine embodied in the rule of construction we are considering has frequently been recognized in will cases.

Thus, in *Habergham v. Vincent* (1793), 2 Ves., 23. Jr., 204, 225, which was decided after extended argument and much consideration, Wilson, J., said: "The general rule is, that, when a man has expressed a clear intention to dispose of his estate, and has taken an ineffectual mode of doing it, yet, if the instrument can be construed in another manner so as to effectuate his intention, the ceremony is matter of form; and the substance shall be carried into execution, if it may by law. * * *

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So here, though the testator has called this a deed, yet, as the intention was to complete what was incomplete by the will, as it is in writing, and signed, and as to some purposes, perhaps to all, it may have a legal operation, if testamentary, in order to sustain the intention it is fair so to consider it; and I do not know any rule that stands in the way." In *Milledge v. Lamar* (1816), 4 Des. (S. C.) 617, James, J., in considering whether an instrument in form a deed, and which would be void as such, could operate as an executory devise, said: "But as an instrument in writing, solemnly executed, this court appears bound to give it some operation. Now the doctrine is, that when a man has expressed clearly his intention to dispose of his estate, and has taken an ineffectual mode of doing it, yet if the instruments can be construed in another manner, so as to effectuate his purpose, the ceremony is matter of form, and the substance shall be carried into execution, if it may by law. And although this paper has the form of a deed, yet as it was intended to take effect at the death of the testator, and is ratified by his will, it may be considered as testamentary." In the same case, Desaussure, J., said: "The instrument under consideration may be so construed, if it be necessary to do so, in order to give effect to the intention of the maker. It is a leading object with courts of justice to give effect to the intention of parties, both in their deeds and wills. 3 Bacon's Abr., 393. That great and virtuous magistrate, Lord Hale, said in the case of *Pibus v. Mitford* [(1669), 1 Vent. 372], (cited in 1 Ves., Sr., 153), 'that we ought to serve the intent if we can, as the best expositor we can go by.'" See, also, *Thorold v. Thorold* (1809), 1 Phil. Ecc. 1; *Masterman v. Maberly* (1829), 2 Hagg. Ecc. 235; *In the goods of Morgan* (1866), L. R. 1 P. & D. 214; *Thompson v. Johnson* (1851), 19 Ala. 59; *Sharp v. Hall* (1888), 86 Ala. 110, 5 South. 497, 11 Am. St. 23; *Crocker v. Smith* (1891), 94 Ala. 295, 10 South. 258, 16 L. R. A. 576; *Crain v. Crain* (1858), 21 Tex. 790; Broom's Legal

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Maxims, *640; Sheppard's Touchstone, 82, 83; 1 Williams, Executors (7th Am. ed.), 150.

Cases may be found in which courts have exhibited a like anxiety to uphold as deeds instruments which could not operate as wills. Such cases and those we have above referred to are like emanations of the principle "that unless an instrument, which has been fully executed, from every point of view seems to be a nullity, it will not be intended that the parties meant that it should be invalid, and some effect will, if possible, be given to it." *Spencer v. Robbins* (1886), 106 Ind. 580.

The intent to execute the power conferred by the will of John McGlinn appears on the face of the instrument, and it is to be implied from the circumstances. *Rinkenberger v. Meyer* (1900), 155 Ind. 152, and cases cited.

Appellants, by cross-complaint, attacked the execution by decedent of the instrument of September 1, 1903, on a number of grounds, among which it is sufficient to mention unsoundness of mind and undue influence.

Upon the trial, appellants, in an appropriate manner, offered the testimony of two physicians as to the physical and mental condition of said decedent a number of months subsequent to the signing of said instrument, and it was sought to prove that such condition must have existed at the time in question. It appeared that the knowledge of said physicians as to decedent's condition was obtained while treating her professionally, but John Heaston, as executor of the will of April 30, 1903, attempted to waive the objection that they were incompetent. Complaint is made that the court refused to permit appellants to prove by said physicians the facts within their knowledge. The statute which makes physicians incompetent to testify to matters concerning their patients which they learn by reason of their professional relation contains no qualifying terms. As the patient may waive the privilege, since it is

for his benefit, we recognize as proper the holdings of this court that the executor of the patient who enjoyed such privilege may, for the purpose of upholding his attempted testamentary disposition of his property, waive the privilege which the statute confers, but since in this case the attack was solely upon the testamentary instrument of September 1, 1903, we should regard it as a perversion of said holdings to attempt to apply them to this case. It appears from the record that the wife of said Heaston was a legatee under the former will, and he was the principal witness on behalf of appellants. It is to be remembered that upon the making of the formal proof as to the execution of the instrument, it became incumbent upon appellants to show that what was *prima facie* the act of decedent was not such in law. Had this contest come after the formal probating of the instrument of September 1, 1903, and the issuing of letters of administration with the will annexed, the holder of such letters would have been charged with a duty of seeking to maintain said instrument, and he alone, in view of the posture of the case, could have waived the privilege of his decedent. The fact that these steps were not taken made no difference so far as the former will was concerned. Those who claimed under it could not waive the objection to a disqualified witness in order that they might overthrow what was *prima facie* the valid act of the decedent, for whose benefit the statute had interposed the bar. It was not a race of diligence as to who could first procure the probating of the will which he possessed, so as to put the other party on the defensive. A waiver must have its basis in the right of the decedent, and in such a case as this it can only be invoked by the executor who is seeking to support what *prima facie* at least was the valid act of his testator. See *Towles v. McCurdy* (1904), 163 Ind. 12; *Brackney v. Fogle* (1901), 156 Ind. 535.

In the portion of appellants' brief devoted to the argument of the cause, their counsel complain of the action of

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the court in excluding evidence that William Krieg, 26. the husband of appellee, stated in the presence of the executors of John McGlinn's estate and certain lawyers whom they were consulting as to the right of said Esther to enter into such an agreement as the one in question, that he and his wife desired the whole of the estate for keeping said decedent. The competency of this evidence is claimed on the ground that it was a circumstance tending to show undue influence. While we recognize the legal proposition that such influence may in some circumstances be made out without direct proof of the actual exercise thereof, yet we seriously doubt whether there was enough evidence to warrant the submission of such question in this case. *Teegarden v. Lewis* (1896), 145 Ind. 98; *Slayback v. Witt* (1898), 151 Ind. 376. It also appears to us that appellants in other instances had the benefit of the ultimate facts sought to be proved. But granting that there was technical error in excluding the evidence, 27. appellants are not entitled to a reversal on account thereof, because of the state of the record. The rulings were respectively made the tenth, thirteenth, fourteenth and seventeenth grounds for a new trial. The practice was pursued in each instance of setting out in the motion what purported to be a transcript of a number of questions, together with the offers to prove and the rulings of the court, and where such answers were permitted, they are also set out. In each instance the assignment of the ground for a new trial was joint, and appellants have therefore taken upon themselves the burden of showing that all of the rulings embraced within a particular cause for a new trial were erroneous. *Cincinnati, etc., R. Co. v. Madden* (1893), 134 Ind. 462; *Lawrence v. Van Buskirk* (1895), 140 Ind. 481; *Indiana, etc., R. Co. v. Snyder* (1895), 140 Ind. 647; *Masterson v. State* (1896), 144 Ind. 240; *Sievers v. Peters, etc., Lumber Co.* (1898), 151 Ind. 642. Each ground for a new trial, as a joint one, may be de-

fended on the ground either that a question embraced therein was leading or called for a conclusion or for matter *prima facie* privileged, or that it was followed by legal argument, instead of an offer to prove, and in one instance, concerning which complaint is made of the ruling on the motion for a new trial, the motion states that the objection to the exclusion of the evidence was overruled, instead of sustained. Counsel have also failed to comply with the rules of this court both in respect to pointing out the page and line where the particular ruling may be found and in failing to state the proposition under the points-and-authorities subdivision of their brief, as required by rule twenty-two of this court. It is further objected that the

28. court erred in permitting witnesses who had long been acquainted with said decedent to testify as to their opinion that she was of sound mind. The particular objection which is thus advanced is that said witnesses did not state facts sufficient to be made the foundation of an opinion as to the mental condition of said decedent. There is no merit in these objections, especially in view of the fact that the witnesses were called for the purpose of proving that said decedent was sane. They certainly revealed a sufficient acquaintance with her so that the court was authorized to submit the question as to the weight of their opinion to the jury. *Colee v. State* (1881), 75 Ind. 511, 514; *Ryman v. Crawford* (1882), 86 Ind. 262; *Goodwin v. State* (1884), 96 Ind. 550, 558; *Blume v. State* (1900), 154 Ind. 343.

The question whether the court erred in the giving and refusal of particular instructions is discussed in the brief of appellants at some length. The point is made,

29. however, by the other side that all of these matters are included within a joint assignment of errors, and we are of opinion that this is the case. *Kackley v. Evansville, etc., R. Co.* (1893), 7 Ind. App. 169. As it is not claimed that the court erred in all of these rulings, we

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are not called on to consider the particular questions concerning the instructions which counsel have sought to raise. *Conrad v. State* (1896), 144 Ind. 290; *Masterson v. State* (1896), 144 Ind. 240; *Lawrence v. Van Buskirk* (1895), 140 Ind. 481; *Cincinnati, etc., R. Co. v. Madden* (1893), 134 Ind. 462; *Moore v. Orr* (1894), 10 Ind. App. 89.

Finally, it is urged that the verdict was contrary to the evidence. We have already considered every question that was really deserving of consideration which was
30. presented under the above ground for a new trial.

Beyond that we may state that appellee was only called on to make formal proof in order to sustain her case, and even within the field of controversy as to the due execution of said will, the jury was wholly justified in returning the verdict in favor of appellee.

Judgment affirmed.

RYAN v. RHODES, SUPERINTENDENT, ET AL.

[No. 20,645. Filed December 6, 1905. Rehearing denied June 29, 1906.]

1. JUDGMENT.—*Collateral Attack.—Industrial School for Girls.—Commitment.*—The judgment, though erroneous, of a court of superior jurisdiction committing a married girl under fifteen years of age to the Indiana Industrial School for Girls under the act of 1903 (Acts 1903, p. 91) is not subject to a collateral attack, where the court had jurisdiction over the person. p. 123.
2. HABEAS CORPUS.—*To Release Prisoner.—Collateral Attack.*—An attempt, by *habeas corpus*, to obtain the release of a person in custody under the judgment of a court is a collateral attack on the judgment of such court. p. 124.
3. SAME.—*Correcting Errors.—Appeal and Error.*—The writ of *habeas corpus* cannot be used to correct the errors a court may have made in its judgment committing the plaintiff. p. 124.
4. PARTIES.—*Husband and Wife.—Industrial School for Girls.—Commitment.*—In a proceeding to commit an alleged incorrigi-

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ble girl under fifteen years of age to the Industrial School for Girls (Acts 1903, p. 91), the husband of such girl is neither a proper nor a necessary party. p. 124.

5. JUDGMENT.—*Collateral Attack.*—*Issues.*—*Questions Capable of Litigation.*—All questions which might have been litigated under the issues in a cause are conclusively settled by the judgment therein as against a collateral attack. p. 126.

From Superior Court of Marion County (68,618); *Vinson Carter*, Judge.

Action by William A. Ryan against Emily Rhodes, as Superintendent of the Indiana Industrial School for Girls and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

A. F. Knotts, F. M. Conroy and James W. Noel, for appellant.

Charles W. Miller, Attorney-General, C. C. Hadley, L. G. Rothschild, W. C. Geake and Charles A. Weathers, for appellees.

MONKS, J.—This proceeding was brought by appellant to obtain, by writ of *habeas corpus*, the discharge of his wife, an infant under fifteen years, from the Indiana Industrial School for Girls. On motion of appellees, the writ of *habeas corpus* was quashed, and the court rendered final judgment against the appellant.

It appears from the application for the writ that Fay Ryan was on June 27, 1904, committed by the Lake Superior Court to said industrial school under the first clause of §8273 Burns 1901, §6180 R. S. 1881 and Horner 1901, as amended by the act of 1903 (Acts 1903, p. 91, §8273 Burns 1905), on the complaint of her father that she was incorrigible and beyond his control. It is alleged in said application that said Fay Ryan and appellant were married on November 23, 1902, and were husband and wife at the time of said commitment. Appellant insists that §8273, *supra*, as amended by the act of 1903, *supra*, only applies to unmarried females under fifteen years of age, for which reason the commitment of Fay Ryan, who was the wife of

appellant, although under the age of fifteen years, to the Indiana Industrial School for Girls was a nullity.

It is not necessary to determine whether said section applies to married females under the age of fifteen years.

The Lake Superior Court is a court of general juris-

1. diction, and there is no claim that it did not have jurisdiction to entertain and decide proceedings to commit the persons mentioned in §8273, *supra*, as amended in 1903, to the Indiana Industrial School for Girls. Whether this particular case, in which appellant's wife was committed, actually belonged to that class is not material in this proceeding. Said court was called upon to decide whether it did or did not. This judgment, if conceded to be erroneous, is impervious to collateral attack. *Koepke v. Hill* (1901), 157 Ind. 172, 87 Am. St. 161, and cases cited; *Williams v. Hert* (1901), 157 Ind. 211, 87 Am. St. 203; *Winslow v. Green* (1900), 155 Ind. 368; *Gillespie v. Rump* (1904), 163 Ind. 457; *Welty v. Ward* (1905), 164 Ind. 457; *Cruthers v. Bray* (1903), 159 Ind. 685; *Bruce v. Osgood* (1900), 154 Ind. 375, 378, and cases cited; *Gold v. Pittsburgh, etc., R. Co.* (1899), 153 Ind. 232, 240-247; *Hiatt v. Town of Darlington* (1899), 152 Ind. 570, 575-579, and cases cited; *Evansville Ice, etc., Co. v. Winsor* (1897), 148 Ind. 682, 690-692, and cases cited; *Board, etc., v. Harrell* (1897), 147 Ind. 500, 502, 503, and cases cited; *Jones v. Cullen* (1895), 142 Ind. 335, 342-347, and cases cited; *Perkins v. Hayward* (1892), 132 Ind. 95, 102-105; *Soules v. Robinson* (1902), 158 Ind. 97, 99-101, 92 Am. St. 301. Said court, by committing said Fay Ryan, must have decided either that a married female under the age of fifteen years came within the provision of the first clause of §8273, *supra*, or that she was an unmarried female, and either of such decisions if made, even if erroneous, under the cases cited, is binding and conclusive until set aside.

It is evident that said judgment of the Lake Superior Court is not void, and is not therefore subject to collateral

attack by writ of *habeas corpus* or otherwise. *Soules*

2. *v. Robinson, supra; Lee v. McClelland* (1901), 157 Ind. 84, 89, 90, and cases cited; *Williams v. Hert, supra; Koepke v. Hill, supra; Winslow v. Green, supra.*

This proceeding by *habeas corpus* cannot be used to correct errors, if any, in the case in which said com-

3. mitment was made. *Welty v. Ward, supra*, and cases cited; *Williams v. Hert, supra; Gillespie v. Rump, supra.*

Judgment affirmed.

Gillett, C. J., took no part in the decision of this cause.

ON PETITION FOR REHEARING.

JORDAN, C. J.—Appellant petitions for a rehearing in this cause, and his learned counsel has from his standpoint presented an able and extensive argument in sup-

4. port of the petition. The argument is advanced that the judgment of the Lake Superior Court affected the personal and sacred domestic rights of appellant without his being a party to the proceedings in which the judgment was rendered; that for this reason he had no remedy by appeal, and the only one open to him now for asserting and enforcing the legal rights which he claims in securing the liberation of his wife from the institution to which, under the judgment, she was committed, is the remedy which he now herein invokes.

But under the statute involved in the action instituted in the Lake Superior Court appellant was neither a necessary nor proper party. It might with equal force be argued that had his infant wife been charged with and convicted in a court of competent jurisdiction of having violated a penal law of this State, and, as a punishment for such violation, committed to prison, appellant, by reason of the fact that he was not a party in the criminal prosecution, would have been entitled to the right to secure her release by writ of *habeas corpus*. He certainly is in no better position to

avail himself of the remedy which he seeks herein under the facts than he would be in the case which we have supposed. In either his right to secure her release by writ of *habeas corpus* must rest on the fact that there was an absence or lack of jurisdiction on the part of the court over the subject-matter, and not the fact merely that the court erred in construing the statute under which the proceedings or action were had, and that its judgment was therefore wrong.

When the father of appellant's minor wife presented his petition to the Lake Superior Court, charging therein that his said daughter was incorrigible, etc., the jurisdiction of that court over the subject-matter was thereby invoked.

The statute under which the proceedings in question were had invested that court with complete jurisdiction over the subject-matter, and under the complaint filed the court was, in effect at least, requested to determine or decide as to its power under the facts to commit the incorrigible infant to the care and custody of the institution in question, as provided by the statute.

Whether the law was intended to apply alone to unmarried females under the age of fifteen years, or whether it embraced all within the age mentioned, whether married or unmarried, was a matter for the determination of the court in placing an interpretation upon the statute. That issue or question was tendered or presented by the complaint, and under the judgment of the court it was, if not expressly, at least impliedly, settled or determined adversely to appellant's contention. Possibly the court may not have been apprised of the fact that the defendant was married. Nothing to the contrary appearing, it may have assumed that she was not, as she had not attained the age fixed by the statute for females to enter into the married relation. But, as originally asserted, the question, whether a married infant under the age of fifteen years came within the meaning of the statute, was, impliedly at least, tendered or presented by the proceedings.

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The rule is well settled since the decision of this court in *Fischli v. Fischli* (1825), 1 Blackf. *360, 12 Am. Dec. 251, that a judgment in an action or proceeding

5. determines or settles all material issues involved between the parties to the action and all matters which might have been properly litigated and settled within the issues tendered or made by the pleading, and to this extent the judgment is not subject to a collateral attack. *Van Fleet*, Former Adjudication, p. 2; *Faught v. Faught* (1884), 98 Ind. 470.

In addition to the authorities cited in the original opinion, see *Stoy v. Indiana, etc., Power Co.* (1906), 166 Ind. 316, and authorities cited; 1 Elliott, Gen. Prac., §246.

We have again given this case a careful consideration, and are fully satisfied with the conclusions reached at the former hearing.

Petition for rehearing overruled.

HAAG v. DETER.

[No. 20,879. Filed June 29, 1906.]

APPEAL AND ERROR.—*Vacation Appeal.—Parties.—Assignment of Errors.*—Where one of two joint judgment defendants appeals and does not make his codefendant a party to the assignment of errors, the appeal will be dismissed, though notice of such appeal was served on such codefendant.

From Wabash Circuit Court; *A. H. Plummer*, Judge.

Action by Melissa Deter against Henry M. Haag and another. From a judgment for plaintiff, said Haag appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Appeal dismissed.*

McCracken & Eikenbury, for appellant.

Reasoner & Ward, for appellee.

PER CURIAM.—In the court below appellee recovered a joint judgment against appellant and one Enyart, and from

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said judgment appellant seeks to prosecute a vacation appeal. Notice has been served on Enyart, but he has not been named as a party in the assignment of errors. Appellee makes this point, and insists on a dismissal of the appeal. Rule six of this court requires that "the assignment of errors shall contain the full names of all the parties," and under the settled practice this appeal must be dismissed. Elliott, App. Proc., §323; Ewbank's Manual, §126.

It is so ordered.

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168 587

BEERY ET AL. v. DRIVER ET AL.

[No. 20,668. Filed March 8, 1906. Rehearing denied June 29, 1906.]

1. **APPEAL AND ERROR.**—*Instructions.*—*Bill of Exceptions.*—Instructions saved by a special bill of exceptions duly signed and filed by the trial judge and showing the proper exceptions taken, are a part of the record. p. 129.
2. **DRAINS.**—*Remonstrances.*—*Joint.*—*When Proper.*—All remonstrators to a ditch proceeding may properly join in a remonstrance against same on the grounds that the benefits thereof would not equal the expense, and that it would not be of public utility. *Yeoman v. Shaeffer*, 155 Ind. 308, distinguished. p. 129.
3. **SAME.**—*Cleaning.*—*Duty of Landowners.*—Under §§5637, 5638 Burns 1901, Acts 1893, p. 271, and Acts 1891, p. 47, §2, it is the imperative duty of the landowners through whose lands a public ditch is constructed, annually to clean out the same without waiting for the orders of the township trustee. p. 129.
4. **SAME.**—*Obstructions.*—*New Drains Because of.*—Landowners, through whose negligence and failure of duty a public ditch has become obstructed and rendered unfit for drainage, cannot, because of such obstructions, establish a new drain and thereby shift the burden of clearing such obstructions upon other people. p. 132.
5. **TRIAL.**—*Instructions.*—*Drains.*—*Public Utility.*—Where there was evidence tending to show that an existing ditch, if cleaned, would serve all purposes, and that the construction of the pro-

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posed drain was an attempt to shift upon others the expense of clearing the obstructions, it was error to instruct that the purpose of petitioners was not a question and that the public utility of the proposed drain was the only question. p. 132.

6. TRIAL.—*Instructions.*—*Invasion of Province of Jury.*—*Drains.*—An instruction in a drainage proceeding, which assumes that the proposed drain will reclaim wet lands, render the community more healthful and benefit a public highway, is erroneous where such facts are controverted. p. 133.
7. SAME.—*Instructions.*—*Applicability.*—It is not error to refuse to give an instruction not applicable to the case. p. 133.
8. EVIDENCE.—*Opinions.*—*Drains.*—It is improper to ask a lay witness in a drainage proceeding whether the proposed drain would be more effectual in carrying off the water than the present one if cleaned, since that is a question for the determination of the jury, and is capable of proof otherwise. p. 133.

From Allen Circuit Court; *Owen N. Heaton*, Special Judge.

Drainage proceedings by John S. Driver and others against which Henry Beery and others remonstrate. From a judgment for petitioners, remonstrants appeal. *Reversed.*

Aiken & Belot and *W. & E. Leonard*, for appellants.

Thomas E. Ellison and *Hugh G. Keegan*, for appellees.

MONTGOMERY, J.—This is a proceeding for the establishment of a ditch, begun before the Board of Commissioners of the County of Allen, in which appellees were petitioners and appellants were remonstrators. The board rendered a final judgment establishing the ditch, from which an appeal was taken to the circuit court, where a trial by jury resulted in a verdict and judgment in favor of the petitioners.

Appellants jointly and severally assign as error the overruling of their motion for a new trial.

Complaint is made in the motion for a new trial of the insufficiency of the evidence to sustain the verdict, and of the giving and refusing to give certain instructions, and other errors of law occurring upon the trial.

Appellees' counsel insist that the instructions are not in the record, but they are manifestly mistaken. The instructions were all properly embraced in a special

1. bill of exceptions duly signed and filed by the trial judge, from which it appears that at the time of giving the instructions complained of appellants' counsel duly excepted to the giving of each of the same, and also excepted to the refusal to give each instruction tendered by them and refused by the court.

The only issues presented for trial upon appeal were whether the aggregate benefits would exceed the total expense of the ditch, and whether the same would be

2. of public utility. Appellants joined in the remonstrance and in the motion for a new trial. Appellees' counsel suggest that upon the authority of *Yeoman v. Shaeffer* (1900), 155 Ind. 308, separate remonstrances and motions for a new trial should have been filed. This objection if tenable should have been raised in a proper manner in the court below; but, where parties have the requisite qualifications, there can be no impropriety in their joining in a remonstrance, upon grounds not affecting their interests severally, but of a general character, and of a nature, if true, to defeat the work as an entirety. The questions involved are properly presented, and appellees' objections are untenable and cannot be sustained.

We cannot reverse the case upon the weight of the evidence.

At the request of appellees' counsel the court gave to the jury the following instruction: "I further instruct you that there is no legal duty resting upon these peti-

3. tioners to keep a ditch through their premises open and free from obstructions, except at the time and in the manner they are required to do by the county surveyor and the township trustee. You will therefore not consider whether it is the fault of any one that the present

ditch is obstructed and insufficient to carry off what water comes through it. The reasons for the condition do not concern us in the trial of this cause.”

The court refused to give the following instruction requested by appellants: “If you find from the evidence in this cause that the plaintiffs, who are the petitioners for the construction of the proposed ditch, permitted the ditch now existing across their lands to be trampled in by stock, or otherwise to become filled up and in need of cleaning, and you find that the exclusive benefits to be derived from the construction of the ditch in question here would be to clean out and put in proper condition said ditch now existing, and you further find that said filling up of said existing ditch was caused by neglect or fault of the plaintiffs alone, then you would be authorized to find that the proposed ditch is not of public utility, as a person cannot allow a ditch on his own premises through his own fault or neglect to become out of repair and then call upon his neighbors or parties owning lands along the route of the proposed ditch to help him pay for necessary cleaning of the same, and if you find such facts to exist it would then be your duty to find for the defendants.”

These two opposing instructions present the controlling contentions of the parties with respect to the public utility of the proposed ditch. The new work consisted of widening and deepening a section of an existing public ditch. The evidence as presented to us tends strongly to prove that by cleaning out the existing ditch to its original dimensions all the uses of the proposed work would be effectually accomplished.

Section 5637 Burns 1901, Acts 1893, p. 271, provides that after allotments for repairs have been made, “it shall be the duty of the owner of each tract of land * * * to clean out and repair the portion of said work so allotted to such tract of land * * * between the first days of

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August and November of each and every year.” To secure a consecutive and orderly performance of the work it is made the duty of the township trustee, by §5638 Burns 1901, Acts 1891, p. 47, §2, to fix the exact limits after the first of August and before the first of November within which such work must be done.

Section 5639 Burns 1901, Acts 1889, p. 53, §8, provides: “If the portion or any part thereof of such ditch or drain so allotted to the land of any owner, * * * becomes filled or obstructed by the negligence of any owner or occupant of any land, or by cattle, horses, hogs or other stock of such owner or occupant, it shall be the duty of such owner or occupant to remove all such obstructions or fillings, at his own expense, before the 31st day of August of each year.”

In discussing the provisions of §§5637, 5638, *supra*, in the case of *Daggy v. Ball* (1893), 7 Ind. App. 64, 66, the Appellate Court said: “It will be observed that these sections do not confer upon the trustee any discretionary power to examine the drains, and ascertain and determine whether they really need cleaning out in order to enable them to subserve their purpose, nor do these sections require the owner to clean out if really needed to make the ditches work right. On the contrary, by these sections the law imposes upon the owner the absolute duty of cleaning out and repairing annually. Recognizing that in the course of nature, by the action of the running water, and by frosts and falling rains and other natural causes, there must necessarily be within a year more or less disturbance of the ditch from its original condition, the law determines the frequency with which these cleanings shall be made.”

The statute imposes a plain duty upon the owners of land against which allotments for the repair of a public ditch have been made to clean out such allotments annually within prescribed dates. The language of the statute is almost too plain to require construction; but the Appellate

Court, as shown, has emphasized the mandatory character of that duty. If any part of such ditch shall be obstructed by the negligence of the owner or occupant of any land, or by his stock, he must, under the provisions of §5639, *supra*, remove such obstructions at his own expense before August 31 of each year. In view of these statutory provisions it cannot be said that the owners of lands charged with the maintenance of allotted portions of a ditch are under no legal duty to free the same from obstructions except as required by the township trustee, and the above instruction, given at the request of appellees, is incorrect in so declaring the law. It is equally plain that such landowners may not negligently suffer or cause a ditch to become filled

4. up and obstructed, and under the guise of constructing a new work compel others to contribute to the expense of removing such obstructions, where the existing ditch, if properly cleaned and repaired, would effectually drain their lands and dispense with the necessity for the proposed improvement. It follows that the instruction tendered by appellants should have been given.

In the fourth instruction, given at appellees' request, the court advised the jury "that the purpose of the petitioners in asking for the construction of this ditch is not for

5. you to consider, but that you will only determine whether the ditch as proposed will be of public utility," etc. This was an erroneous declaration of law as applied to the case at bar, for reasons already stated. It withdrew from the jury consideration of all evidence given by appellants to the effect that the old ditch properly maintained would subserve the purposes to be accomplished by the new one.

Instruction three is subject to criticism; but in view of the conclusion already reached and the probability that the whole series will be rewritten, we will not now discuss its imperfections.

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Instruction six must be condemned for assuming the truth of controverted facts, and thereby invading the province of the jury. It is improper for the court,

6. upon the issues and the evidence in this case, to assume that the proposed ditch would reclaim wet lands, or render the community more healthful, or benefit a public highway. *Scott v. State* (1878), 64 Ind. 400, 403; *Ohio, etc., R. Co. v. Percy* (1891), 128 Ind. 197; *Steele v. Davis* (1881), 75 Ind. 191; *Van Camp, etc., Iron Co. v. O'Brien* (1902), 28 Ind. App. 152; *Chicago, etc., R. Co. v. Butler* (1894), 10 Ind. App. 244.

We have examined the seventh and tenth of appellees' instructions, and, while somewhat vague and of doubtful applicability to the evidence, we find no harmful error in them.

The fourth instruction requested by appellants

7. was not applicable to the issue tendered by their remonstrance, and was rightly refused.

In response to the question: "Would the construction of a larger ditch have any more effect in taking off the water than if the present ditch were cleaned out?"

8. witness Ezra Worden answered: "I do not think it would, because it is a level country." This question was objected to, and the answer stricken out upon motion. There was no error in this ruling. The question called for, and the answer expressed, the opinion of the witness upon the merits of appellants' contention. The form of the question was objectionable in case the opinion of a lay witness were competent; but in the present instance the facts with regard to the effectiveness of the old ditch when in proper repair, and when enlarged as proposed, could be fully placed before the jury, and the opinion of the witness upon this issue was not competent. *Yost v. Conroy* (1884), 92 Ind. 464; *Johnson v. Anderson* (1896), 143 Ind. 493; *Loshbaugh v. Birdsell* (1883), 90 Ind. 466;

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Dillman v. Crooks (1883), 91 Ind. 158; *Hughes v. Beggs* (1888), 114 Ind. 427; *Brunker v. Cummins* (1892), 133 Ind. 443.

The errors pointed out entitled appellants to a new trial. The judgment is reversed, with a direction to sustain appellants' motion for a new trial.

FOLEY v. O'DONAGHUE, EXECUTOR, ET AL.

[No. 20,649. Filed March 30, 1906. Rehearing denied June 29, 1906.]

1. **APPEAL AND ERROR.**—*Assignment of Errors.*—*Parties.*—*Jurisdiction.*—*Waiver.*—Where a defendant in a representative capacity below is made an appellee, on appeal, in his personal capacity, but his attorneys accepted service of notice of the appeal and filed a brief on the merits, he waived his right to object to the jurisdiction of his person on appeal. p. 135.
2. **WILLS.**—*Contest.*—*Estoppel.*—*Executors and Administrators.*—*Final Settlement.*—The administration and final settlement of an estate, by the executor, as prescribed by the terms of the will, with the full knowledge of the heirs, does not constitute an estoppel *in pais* preventing their right to contest such will. p. 137.
3. **SAME.**—*Contest.*—*Limitation of Actions.*—*Statutes.*—The three-year period given by statute (§2766 Burns 1901, §2596 R. S. 1881) in which to contest a will is a substantive right which cannot be abridged by the courts, and which is not strictly a statute of limitations. p. 137.
4. **SAME.**—*Contest.*—*Executors and Administrators.*—*Final Settlement.*—*Res Judicata.*—The executor's final settlement of the testator's estate, as prescribed by law, does not preclude a contest of the will by the heirs. *Stuckwisch v. Kamman*, 166 Ind. 672, followed. p. 137.
5. **DECEDENTS' ESTATES.**—*Executors and Administrators.*—*Duty to Settle Estates.*—It is the duty of an executor to administer the testator's estate, without regard to the heirs' statutory right of contest, and distribute the proceeds as directed in the will. p. 138.

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6. **WILLS.—Contest.—Parties.—Executors.**—Where the executor of a will has been discharged on final settlement, he is not a proper or necessary party to a contest of such will. p. 138.

From Marion Circuit Court (11,873); *Henry Clay Allen*, Judge.

Action by Jerry Foley against Denis O'Donaghue, as executor of the will of Mary O'Connell, deceased, and others. From a judgment for defendants, plaintiff appeals. *Affirmed in part. Reversed in part.*

Charles F. Coffin, for appellant.

Hefron & Herrington and *H. S. McMichael*, for appellees.

GILLET, C. J.—This is an action instituted by appellant to contest a will. The caption of the complaint makes Denis O'Donaghue, as executor of the last will and testament of Mary O'Connell, together with the other appellees in this case, parties defendant. It appears from the body of the complaint that the effort is to contest the will of Mary O'Conner, and it is charged that letters were issued to said Denis O'Donaghue as executor of said will. A separate answer was filed in said cause by Denis O'Donaghue, as executor of the last will of Mary O'Connor, and the other defendants who appeared joined in an answer.

Counsel who represented the defendants who answered below accepted service of the notice of appeal, but, after entering a full appearance in this court, they sug-

1. gest, in connection with their brief on the merits, that the appeal ought to be dismissed, for the reason that in the assignment of errors Denis O'Donaghue, as executor of the last will and testament of Mary O'Connell, has been made an appellee, and that said O'Donaghue has not been made an appellee in his capacity as executor of the will of Mary O'Connor. The objection is purely technical, and as it is apparent that appellant has made an effort in good faith to comply with the rules of this court,

and as all possible objection to the jurisdiction over the persons of said defendants has been waived by their full appearance, accompanied by a brief on the merits, we hold that the objection is not well taken. *Walker v. Hill* (1887), 111 Ind. 223; *Hazleton v. De Priest* (1896), 143 Ind. 368; *Loucheim v. Seeley* (1896), 151 Ind. 665; *Ewbank's Manual*, §163.

On the merits, the questions in this case are presented by assignments of errors which draw in question the overruling of a demurrer to the second paragraph of the separate answer of Denis O'Donaghue, executor, and to the second paragraph of the joint answer of the other answering appellees. The second paragraph of said first-mentioned answer alleges that long before the commencement of this suit said estate was, by the judgment and decree of the Marion Circuit Court, duly entered, declared, and adjudged to be fully and finally settled, and that said defendant, as such executor, was discharged from all further duties and liabilities therein, and that he is no longer the executor of said estate. The second paragraph of the joint answer of the other appellees who answered sets up the same facts as are pleaded by the executor in his answer above mentioned, except that the notice which was given of final settlement was more fully pleaded, and it was also alleged that the executor had sold the real estate involved to four different persons, and had marshaled the assets of the estate and paid all costs of administration prior to the filing of his report in final settlement; that during the entire time that said administration was pending appellant was a resident of Marion county and had full knowledge and notice of the proceedings, and he made no objections to any of the proceedings, and gave no notice of his intention to contest said will. The essential question in this case is presented by the allegations of said last-mentioned answer.

It is apparent that said paragraph does not state facts amounting to an estoppel *in pais*, and therefore we need not discuss that question. The only question which said

2. answer can be said to present is the effect of the allegations concerning the final settlement of the estate. It was held by this court in *Stuckwisch v. Kammon* (1906), 166 Ind. 672, that the entering of an order of final settlement in a decedent's estate does not operate to preclude the contest of his will. This holding virtually disposes of the question presented by said answer, but, in view of the argument, a few additional suggestions may be made.

The three-year period given in which to contest the validity of a probated will (§2766 Burns 1901, §2596 R. S. 1881) is not in the nature of a statute of limi-

3. tations; the right which is granted is a substantive one, which it is the duty of the courts to recognize without abridgment or exception. *Mason v. Roll* (1892), 130 Ind. 260; *Bartlett v. Manor* (1897), 146 Ind. 621. The principle here involved is very different from that which rules a line of cases in this State which hold that a complaint to quiet title is a challenge to the defendant to present every claim of every nature against the land, whether growing out of the statutory right to contest a will, or otherwise. The threshold inquiry here is whether it was the intent that the court should adjudicate upon the

4. soundness of mind of the testator and the due execution of his will in the entering of an order of final settlement. Now it is evident that if such an order is *res adjudicata* in respect to the validity of the will, it must have that effect in every case, irrespective of any question as to whether the heir had knowledge of his right at the time of final settlement. This certainly was not the legislative purpose. Here are two statutes: one for the contest of wills, which provides that a will may be contested within three years, and the other for the settlement of the estates of deceased persons, testate and intestate, which contem-

plates that an order of final settlement may be made at the expiration of one year after notice of the granting of letters. Now the only way in which these statutes can be brought into accord is to hold that in proceedings for the settlement of the estate of a person who dies testate the validity of his will is not involved. This does not mean that the estate is to be tied up so that the executor may not take the statutory steps to bring about a liquidation. The proceedings of an executor in the settlement of his decedent's estate are based upon a preliminary judgment

5. which establishes the validity of the will, subject only to the statutory right of contest, and it is the legislative contemplation that in the absence of an intervening contest the estate shall go on to final settlement, and the assets be distributed under such will, as if its provisions were wholly immutable. §2412 Burns 1901, §2257 R. S. 1881; *Allen v. Dundas* (1789), 3 T. R. 125, 129; 1 Woerner, Am. Law of Administration, *501; 11 Am. and Eng. Ency. Law (2d ed.), 909; 18 Cyc. Law and Proc., 214, 215. As to whether the contestor can pursue the assets in the hands of the distributees we do not decide, but see 1 Woerner, Am. Law of Administration, *501. We hold that said paragraph was insufficient.

As to the paragraph of answer of O'Donaghue, executor, we are of opinion that it stated facts in bar of an action against him as executor. After the estate had been

6. fully settled, and the executor discharged from the duties of his trust, it is evident that he was no longer a necessary or proper party to the proceedings.

The judgment of the court below that appellant take nothing as against O'Donaghue, executor, is affirmed. As to all other appellees, the judgment is reversed, with a direction to sustain appellant's demurrer to the second paragraph of the answer of the answering defendants.

AIKEN, ADMINISTRATOR, v. CITY OF COLUMBUS.

[No. 20,664. Filed October 2, 1906.]

1. MUNICIPAL CORPORATIONS.—*Liability.—Schools.—Charities.—Police Power.*—Municipal corporations are not ordinarily liable for their conduct in reference to schools or charities, or in the exercise of the police power, such conduct being governmental and not local. p. 141.
2. SAME.—*Purely Corporate Acts.—Liability.*—Municipal corporations are liable for negligence in the performance of purely corporate acts the same as an individual doing similar acts. p. 142.
3. SAME.—*Streets.—Defects.—Liability.—Grounds of.*—The grounds of municipal liability for damages caused by defects in streets are the municipality's exclusive control over the streets and power of taxation for the repair thereof. p. 143.
4. SAME.—*Streets.—Lighting.—Duty as to Statutes.*—Municipal corporations, under §4301 Burns 1901, Acts 1883, p. 85, §1, may light their streets, but are not required, either expressly or by implication, to do so. p. 144.
5. SAME.—*Liability.—Voluntary Exercise of Power.*—The fact that a municipal corporation voluntarily exercises certain powers, is a large factor in determining whether the municipality is liable for negligence in the performance of such powers. p. 144.
6. SAME.—*Liability.—Voluntary Acts for Corporate Advantage.*—Municipal corporations are ordinarily liable for negligence in the performance of acts voluntarily done for their own advantage. p. 144.
7. SAME.—*Proprietorship.—Liability.—Maxims.—Sic utere tuo ut alienum non laedas.*—Municipal corporations are liable, as other proprietors, for negligence in the care and control of their property voluntarily acquired for purposes partly or wholly corporate. p. 145.
8. SAME.—*Streets.—Electric Lights.—Whether Governmental or Corporate Function.—Prevention of Damage Suits.*—While the lighting of streets incidentally checks crime and immorality and thus serves a governmental purpose, such lighting also becomes a corporate utility, sufficient to make municipal corporations liable for negligence therein, by the fact that it is of local convenience and prevents many damage suits brought

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- because of injuries from defective streets, the derivation of an income therefrom being unnecessary to establish such liability. p. 146.
9. **MUNICIPAL CORPORATIONS.—Liability.—Proprietorship.—Governmental and Corporate Purposes.**—Where property is voluntarily held for benefits accruing to the municipality, or as a means of attaining such benefits, though it may also serve a governmental purpose, the municipality is liable for negligence in the control thereof. p. 147.
10. **SAME.—Streets.—Failure to Light.—Negligence.**—The failure of a municipal corporation to light its streets, unless required by statute to do so, does not constitute negligence. p. 149.
11. **SAME.—Liability.—Electric Lights.**—A municipal corporation is liable *ex delicto* for negligence in the management of its electric light plant. p. 150.
12. **SAME.—Liability.—Immunity.—Public Policy.**—Public policy requires that the doctrine that municipal corporations are not liable for negligence in the performance of purely governmental matters, shall be kept strictly within its limits, official vigilance to prevent private wrongs being desirable. p. 150.
13. **PLEADING.—Complaint.—Municipal Corporations.—Negligence.—Proximate Cause.**—A complaint alleging that defendant city negligently suffered one of its electric light wires to become weak and rotten, and that the fall of such wire caused plaintiff's injuries, is bad, since it fails to show that such wire fell because of its weak and rotten condition. p. 150.
14. **APPEAL AND ERROR.—Technicalities.—Merits.**—Where the decision of the trial court was technically right, but wrong on the merits, the Supreme Court will ordinarily decide the case on the merits, especially where the merits of the case must be tried again in the lower court. p. 151.
15. **SAME.—Revision of Judgments.—Power of Supreme Court.**—The general authority of the Supreme Court to review the judgments of lower courts necessarily includes the right to administer justice regardless of technicalities and arbitrary rules. p. 151.
16. **SAME.—Decisions.—Right to Annex Conditions.**—The Supreme Court has the right, in order to administer justice, to mould its decisions so that proper amendments may be made or pleadings be filed below, and the merits of the case determined. p. 152.
17. **SAME.—Defective Complaint.—Negligence.—Limitation of Actions.—Affirmance.**—A judgment for defendant on demurrer

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to a complaint, technically bad, will be affirmed, where the statute of limitations has not barred a new action for the same cause. p. 152.

From Bartholomew Circuit Court; *Marshall Hacker*, Judge.

Action by Lewis Aiken, as administrator of the estate of John M. Weed, deceased, against the City of Columbus. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed*.

John W. Morgan and *W. W. Lambert*, for appellant.

Francis T. Hord, *James F. Cox*, *Charles S. Baker*, *William H. Everroad*, *C. B. Cooper* and *C. J. Kollmeyer*, for appellee.

GILLET, J.—By appellant's complaint in this action appellee was sought to be charged with negligence in the management of its public lighting system, whereby appellant's intestate was killed, on his own premises, by coming in contact with a live wire, belonging to appellee, which had fallen from its electric light pole in the adjoining street. A demurrer was sustained to the complaint, and from the judgment which followed appellant appeals.

It is contended by counsel for appellee that, as it does not appear that the city made any use of said system other than for the purpose of lighting its streets, it was acting in a governmental capacity, and is therefore not to be held liable for the negligence of its employes and servants in the management of the property.

Municipal corporations proper, as cities and towns, do not enjoy as extended immunity from liability *ex delicto* as do public *quasi*-corporations, which are mere sub-

1. divisions of the State, organized for the purpose of administering the local affairs of government. As it is possible, however, to devolve upon cities and towns duties which they administer solely for the public good, it

follows that with respect to such duties they are regarded as acting on behalf of the State, and not in their private or corporate capacity. Speaking in general terms, it may be said that the duties which municipalities perform with respect to the public health, charities, and schools, in the protection of property against fire, and in the maintenance of the peace, are ordinarily regarded as performed as representatives of the general public, and in such cases cities and towns enjoy the same immunity from actions *ex delicto* as does the State.

We may at once put aside, as not involved in this case, all question concerning the nonliability of municipal corporations for their acts or omissions in respect to legis-

2. lative, discretionary, and *quasi*-judicial powers.

The omission in question involves the failure to perform a ministerial act, and, if it was a corporate duty, the municipality was guilty of a tort. It was said by Campbell, J., in *Sheldon v. Village of Kalamazoo* (1872), 24 Mich. 383, 385: "The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the prejudice of private parties. In this respect, public corporations are as distinctly legal persons as private corporations. * * * When the act done is in law a corporate act, there is no ground upon reason or authority for holding that if there is any legal liability at all arising out of it, the corporation may not be answerable. There is no conflict whatever in the authorities on this head." Judge Dillon, who has been at considerable pains to cast into doctrine the decisions of the courts relative to municipal responsibility for tort, says: "As respects municipal corporations proper, whether specially chartered or voluntarily organizing under general acts of the character before alluded to, it is, we think, universally considered, even in the absence of a statute giving the action, that they are liable for acts of misfeasance positively injurious to individuals, done by their authorized

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agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties, and it is the almost, but not quite, uniform doctrine of the courts, that they are also liable where the wrong resulting in an injury to others consists in a mere neglect or omission to perform an absolute and perfect (as distinguished from a legislative, discretionary, quasi-judicial, or imperfect) corporate duty, owing by the corporation to the plaintiff, or in the performance of which he is specially interested." 2 Dillon, Mun. Corp. (4th ed.), §966. As far back as *Ross v. City of Madison* (1848), 1 Ind. *281, 48 Am. Dec. 361, this court declared: "It may also be considered as settled that municipal corporations are responsible to the same extent and in the same manner as natural persons, for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for the benefit of the cities and towns under their government." In four instances this declaration of the law has been approved by this court. *City of Logansport v. Wright* (1865), 25 Ind. 512, 515; *Stackhouse v. City of LaFayette* (1866), 26 Ind. 17, 22, 89 Am. Dec. 450; *Roll v. City of Indianapolis* (1876), 52 Ind. 547, 559; *City of Greencastle v. Martin* (1881), 74 Ind. 449, 452, 39 Am. Rep. 93. As was tersely stated in *Jones v. City of New Haven* (1867), 34 Conn. 1: "Where judicial duty ends and ministerial duty begins, there immunity ceases and liability attaches."

Counsel for appellee concede that if the wire had fallen in a public street, and the city knew, or ought to have known, of its defective condition, appellee would

3. have been guilty of negligence in failing to keep the street safe, but it is to be remembered that the duty of a city or town in respect to the public ways therein grows out of the exclusive power which the municipality possesses over such ways coupled with the power of taxation for general purposes. *Grove v. City of Ft. Wayne*

(1874), 45 Ind. 429, 15 Am. Rep. 262; *Yeager v. Tippecanoe Tp.* (1881), 81 Ind. 46; Elliott, Roads and Sts. (2d ed.), §611. If the city would be liable for the omission of a duty in the case mentioned, *a fortiori*, ought it to be liable in a case involving the elements of a trespass?

There is really but one question in this case, and that is, was the omission a corporate dereliction, or was appellee's act in providing a public lighting system a governmental undertaking? In the determination of this question it is proper to consider the manner in which the power was conferred, the obligations which naturally flow from proprietorship, and the purpose for which the power was granted and exercised.

The city was under no obligation to light its streets. It enjoyed that authority, but the exercise of the power was wholly a matter of its own volition. §4301 Burns

4. 1901, Acts 1883, p. 85, §1; *City of Indianapolis v. Scott* (1880), 72 Ind. 196; Tiedeman, Mun. Corp., §344a, and cases cited. As neither the letter nor the implications of the statute have made the lighting of streets a governmental duty, and as the city derives

5. a benefit in its corporate capacity, as well as a local benefit, from the exercise of the power, the fact that it was voluntarily exercised is an important circumstance.

The proposition finds illustration in a number of cases where the benefits might be said to be in a degree public,

but where there was nevertheless room for the sup-

6. position that the local advantage to the corporation or its inhabitants was a moving consideration in the

voluntary assumption of the power. Thus in *Riddle v. Proprietors, etc.* (1810), 7 Mass. 169, 187, 5 Am. Dec. 35, Parsons, C. J., in pronouncing the opinion of the court, says that it is one of the maxims of the common law "that a man specially injured by the breach of duty in another shall have his remedy by action. If the breach of duty be by an individual, there is no question; and why should a

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corporation, receiving its corporate powers and obliged by its corporate duties with its own consent, be an exception when it has, or must be supposed to have, an equivalent for its consent?" It was held in *Oliver v. City of Worcester* (1869), 102 Mass. 489, 499, 3 Am. Rep. 485, that the city was liable for a defect in a path in the public common. Gray, J., in that case said that cities may be liable "for acts done in what may be called their private character, in the management of property voluntarily held by them for their own immediate profit or advantage, although inuring, of course, ultimately to the benefit of the public." In *Jones v. City of New Haven*, *supra*, the city was held liable for the failure to remove a decayed limb of a tree in the public square, whereby a person was injured, the corporation having properly taken upon itself the duty of caring for the trees.

We shall not dwell at length upon the obligations of proprietorship. Where a city has seen fit to acquire title to property in the management of which it is without

7. let or restriction it would seem peculiarly just, at least where the property in part serves some municipal purpose, that there should be devolved upon the municipality that fundamental obligation of ownership which finds expression in the maxim, "*sic utere tuo ut alienum non laedas*." As said by Mr. Justice Field, in *Baltimore, etc., R. Co. v. Fifth Baptist Church* (1883), 108 U. S. 317, 331, 2 Sup. Ct. 719, 27 L. Ed. 739: "Grants of privileges or powers to corporate bodies like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred." It is perhaps as much upon the ground of proprietorship as any other that it was held in *Twist v. City of Rochester* (1899),

55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131, that a city was liable for permitting a patrol wire, heavily charged with electricity, to fall and remain in a public street. See, also, *Eastman v. Meredith* (1858), 36 N. H. 284, 72 Am. Dec. 302; *Thayer v. City of Boston* (1837), 19 Pick. 511, 31 Am. Dec. 157. We may, in this connection, mention that in *City of Greencastle v. Martin, supra*, it was held that the city was properly charged with negligence in the management of its pound, although the ordinance providing for the impounding of animals was an exercise of the police powers. It was decided in *City of LaFayette v. Allen* (1881), 81 Ind. 166, that the complaint therein, which was by a person who had been employed as engineer of the water-works of the municipality, for injuries received by the explosion of the boiler used in pumping water into the city water-pipes, stated a cause of action, although it is to be noted that there was no allegation in the complaint that the city derived a profit from the sale of water.

Coming to the purpose for which the power to erect an electric light plant was granted, it must be admitted that public lighting serves a governmental purpose, at

8. least in an incidental way, in that it is a check upon crime and immorality, but the element of local convenience to the inhabitants and the extent to which such lights protect the municipal treasury against damage suits, because of streets which have become temporarily or permanently unsafe, afford a very clear basis for the assertion that such lights are a municipal utility. The fact that a city or town, pursuant to statute, voluntarily constructs and maintains a work from which it derives a revenue has frequently been referred to as one of the markings of a municipal undertaking. No case, however, has come to our notice in which this element has been held essential to liability, but there are many authorities that either directly or in effect uphold the opposite view. *Twist v. City of*

Rochester, supra; *Missano v. Mayor, etc.* (1899), 160 N. Y. 123, 54 N. E. 744; *Jones v. City of New Haven, supra*; *Barney Dumping-Boat Co. v. Mayor, etc.* (1889), 40 Fed. 50; *Eastman v. Meredith, supra*; *Thayer v. City of Boston, supra*; *Oliver v. City of Worcester, supra*; *Dickinson v. City of Boston* (1905), 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664; *Wagner v. Portland* (1902), 40 Ore. 389, 67 Pac. 300; *Webb's Pollock, Torts*, 69; *Jones, Neg. of Mun. Corp.*, §150; *Williams, Mun. Liability for Tort*, §31. At least as to property voluntarily held,

9. if the exercise of the power confers a benefit upon the people of the community, in their local capacity, or if it is a means to the attainment of some municipal end, we are of opinion that the corporation is held to the exercise of due care concerning such property. The blending of the powers of local sovereignty and corporate capacity in one does not destroy the clear and well-settled distinction which the cases maintain, nor does the confusion render the process of separation impossible. *Western Sav. Fund Soc. v. City of Philadelphia* (1858), 31 Pa. St. 175, 72 Am. Dec. 730; *Bailey v. Mayor, etc.* (1842), 3 Hill 531, 38 Am. Dec. 669.

In the case last cited, which is a leading one upon the general subject under discussion, the question involved was as to the liability of the city of New York for the negligent construction of a dam by its water commissioners. A point of difficulty was presented, in that such commissioners were designated by the legislature, but the city had accepted the benefit of the act. In response to the argument that the undertaking was governmental in its character, Nelson, C. J., said: "The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body—such as are granted exclusively for public purposes to counties, cities, towns and villages, where the corporations have, if I may so speak, no private

estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage or emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company."

In *Barney Dumping-Boat Co. v. Mayor, etc., supra*, the question arose as to the liability of the city of New York for the negligence of persons in charge of a tug used by the city in connection with the cleaning of its streets. Judge Wallace, in referring to the duties of the street commissioner, said: "His duties, unlike those of the officers of the departments of health, charities, fire, and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself, which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them." Following the last-cited case, it was held in *Missano v. Mayor, etc., supra*, that the city was liable for the negligence of the driver of an ash car who was employed in the street-cleaning department.

A case which is precisely like this in principle is *Dickinson v. City of Boston, supra*. In that case the city had by

ordinance established what it termed a lamp department, that included the lamps and other property used by the municipality in its system of street lighting, and the management of the department had been entrusted to an officer. This was done under a statute which authorized, but did not require, the city to maintain lamps to light its streets. An action was brought to recover for injuries received by the plaintiff's intestate, while on her own premises, owing to the fall of a defective lamp-post which stood in the public way. Answering the objection that the officer in charge of the department was a public officer for whose negligence the city was not responsible, the court said: "In suits for damages caused by defects in streets which at night may become dangerous to travelers because they are dark and unlighted it uniformly has been held that as a city or town is under no statutory requirement to light them an omission to do so does not constitute negligence. *Sparhawk v. City of Salem* [1861], 1 Allen 30, 32, 79 Am. Dec. 700; *Randall v. Eastern R. Co.* [1871], 106 Mass. 276, 8 Am. Rep. 327; *Lyon v. City of Cambridge* [1884], 136 Mass. 419; *Spillane v. City of Fitchburg* [1900], 177 Mass. 87, 88, 58 N. E. 176, 83 Am. St. 262. But if, under no obligation imposed by statute, the defendant undertook this service for the general convenience of its citizens and travelers within its borders, it also by so doing derived an incidental benefit by the protection thus afforded of decreasing the probability of actions against it for defective public ways, under Rev. Laws, c. 51, §§1, 18. An unlighted public way indeed may be dangerous when used at night, though not thereby rendered defective. If, however, it is out of repair, and this condition has been undiscovered, or if discovered not remedied, the probability that travelers using it would be less likely to be injured when lighted than if unlighted, is apparent and appreciable. It was unnecessary for the plaintiff to show that any direct commercial profit had been derived. The

indirect benefit thus conferred supplied a sufficient motive for the defendant's action. Having voluntarily undertaken the enterprise for its private benefit, and not acting in the performance of any public duty, it is liable for negligence in the management of its corporate property when used for such purpose. * * * If the defendant lighted its streets as a matter of convenience and safety for those having occasion to use them at night, without being required by law to undertake the performance of such a duty, the superintendent of lamps for this purpose became its servant, for whose negligent conduct in their maintenance it was responsible."

We are satisfied that we are within the authorities in holding, as we do, that a city or town is answerable *ex delicto* for any direct invasion of the rights of third

11. persons in the management of its public lighting system. While the doctrine of immunity of municipal corporations in matters purely governmental is too well established upon the authorities to be shaken, yet we are of opinion that public policy requires that the doctrine should be kept strictly within limits, to the end that so far as possible corporate liability may prompt those charged with responsibility in the government of cities and towns to be alert to prevent wrongs to third persons in the maintenance of municipal property.

The point is made, however, that although it appears that the fall of the wire was the proximate cause of the death of appellant's intestate, and that said wire

13. had become weak and rotten, in which respect appellee is charged with negligence, yet it is not alleged that the wire fell by reason of such defective condition. Although it is clear from a reading of the complaint that this was an assumed fact, yet the omission of the allegation renders the complaint insufficient, and an affirmance must follow.

In passing, as we have, upon the substantial question in this case, whether appellee enjoyed an immunity from liability in the operation of its electric lighting system,

14. we have decided the sole question argued by appellant's counsel, as well as the first and principal question discussed by counsel for appellee. We have not failed to consider whether, since the judgment must be affirmed, we ought not to pass over what appears to be the real controversy, that of municipal liability *ex delicto* in such cases, and base our decision on the clear but narrow ground of a failure to show that the negligence and the result stood in the relation of cause and effect. After much consideration, however, we have arrived at the conclusion that we may with propriety, and that we ought in justice, to decide the real question in the case. In no instance is this court disposed to decide moot questions, or controversies relative to rights in actions which may subsequently be brought; but in this case, finding that the main question is the threshold one, that it is the only one which admits of serious disagreement, and that the complaint is so framed as to show that it was the purpose to charge that the wire fell by reason of the defect, so that it is clear that the missing averment will be supplied, we conceive that our duty is not done in disposing of the case solely on said point and compelling appellant to await the time necessary to dispose of a second appeal, when to decide the real question now, in its order, in the light of full discussion, would be at once to correct the court below in what was evidently its misconception of the law of the case, to the end that in this controversy justice may be administered, to borrow from the sounding phrases of the Constitution (Art. 1, §12), "completely and without denial; speedily and without delay." The general authority to review and revise necessarily includes the right to enforce the law and to
15. administer justice, and the court, upon an investigation of the record, may so frame its judgment as

to prevent the defeat of justice by technical and arbitrary rules. It is a rule, which is also applicable to appellate tribunals, that if a court acquires jurisdiction for one purpose, it will retain it for all, and "our code means that this court shall decide upon the substantial merits of a controversy where it can be properly done." *Feder v. Field* (1889), 117 Ind. 386. See Elliott, App. Proc., §18. Many cases are to be found in the books in which courts of appellate jurisdiction, in affirming judgments, have, in

16. order to protect the evident equities of one of the parties, added some restrictive provision, or added to the judgment of affirmance an order remanding the cause to the court below, either for the purpose of amending the declaration or the plea, or for some other action to be taken in the trial court. *Fidelity Ins., etc., Co. v. McClain* (1900), 178 U. S. 113, 20 Sup. Ct. 774, 44 L. Ed. 998; *In re Petition of Ingraham* (1876), 64 N. Y. 310; *Piper v. Hoard* (1887), 107 N. Y. 73, 13 N. E. 632, 1 Am. St. 789; *Johnson v. Elkins* (1904), 23 App., D. C., 486; *Witty v. Hightower* (1849), 12 Sm. & M. 478; *Manns v. Flinn* (1839), 10 Leigh 93; *Campbell v. Hughes* (1877), 12 W. Va. 183; *Gill v. Rice* (1861), 13 Wis. *549; *Van Orman v. Spafford* (1866), 20 Iowa 215; *McDonald v. Cruzen* (1868), 2 Ore. 259; *Powell v. Dayton, etc., R. Co.* (1886), 14 Ore. 22, 12 Pac. 83. And see *Coch v. Purcell* (1878), 45 N. Y. Super. 162. As said in *Powell v. Dayton, etc., R. Co.*, *supra*: "This discretion, of course, is a judicial discretion—not arbitrary—and is always to be exercised in furtherance of justice." There is no occasion in this case

for an order in the nature of a *procedendo*, as the

17. claim is not barred by the statute of limitations, but, within the principle of the procedure just indicated, we regard ourselves as warranted in disposing of the essential question concerning which the parties have challenged the consideration and judgment of the court.

Judgment affirmed.

STEINMETZ, BY NEXT FRIEND, v. G. H. HAMMOND
COMPANY.

[No. 20,837. Filed October 2, 1906.]

1. JURISDICTION.—*City Courts.—Appeal.—Superior Courts.*—The superior and circuit courts have no jurisdiction of a cause of action appealed from a city court, where such city court had none. p. 156.
2. SAME.—*City Courts.—Justices of the Peace.—Statutes.*—City and justices' courts are of inferior and limited jurisdiction and possess only the powers expressly granted by statute or necessarily implied therefrom. p. 156.
3. FRAUD.—*Effect of.—Judgment.*—Fraud vitiates a judgment. p. 156.
4. JUDGMENT.—*Setting Aside for Fraud.—Courts.—Jurisdiction.*—Circuit and superior courts have jurisdiction to set aside and annul judgments obtained by fraud. p. 157.
5. COURTS.—*City.—Jurisdiction.—Equity Cases.*—City courts have no equity jurisdiction, and cannot set aside judgments obtained by fraud. p. 157.
6. SAME.—*City.—Justices of the Peace.—Jurisdiction.—Equity Cases.*—City courts have no equity jurisdiction under §3669 Burns 1901, Acts 1891 p. 24, §2, providing that their jurisdiction, with certain additions, shall be concurrent with mayors' and justices' courts, since neither justices' courts (§1500 Burns 1901, §1433 R. S. 1881), nor mayors' courts (§3497 Burns 1901, §3062 R. S. 1881), are granted such power. p. 157.
7. JURISDICTION.—*Waiver.—Consent.—Motions.*—Jurisdiction of the subject-matter cannot be waived either by silence or consent; and the want of jurisdiction may be questioned at any stage of a case; and where such want appears upon the face of the record, no formal motion is necessary to present the question. p. 159.
8. APPEAL AND ERROR.—*Jurisdiction.—Raising Question for First Time in Supreme Court.*—An objection for want of jurisdiction may be raised for the first time in the Supreme Court. p. 159.
9. SAME.—*Jurisdiction.—Judgment.—Superior Court.—Reversal.*—Where the superior court entered a decree on the merits for defendant in an equity case appealed from a city court having no jurisdiction over the subject-matter, the Supreme Court will remand said cause with an order to vacate such judgment and dismiss the suit. p. 159.

From Lake Superior Court; *H. B. Tuthill*, Judge.

Suit by Philip Steinmetz, Jr., by his next friend, against the G. H. Hammond Company. From a decree for defendant, plaintiff appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

L. L. Bomberger, for appellant.

John B. Peterson, for appellee.

JORDAN, C. J.—This suit was commenced on June 2, 1903, by appellant, a minor, by his next friend, in the city court of the city of Hammond, Lake county, Indiana, to have a certain judgment rendered in said court declared void, vacated and set aside, on the ground of fraud perpetrated by appellee in securing the rendition thereof.

The following are some of the material facts disclosed by the amended complaint filed in the proceedings: On November 12, 1902, appellant, Philip Steinmetz, a minor in the employ of appellee company, was injured through its alleged negligence while at work in its packing house at the city of Hammond, Indiana, on account of which injuries his left arm had to be amputated near the shoulder, etc. On November 15, 1902, the father of appellant, Philip Steinmetz, as his next friend, instituted in the city court of Hammond against appellee, in the name of appellant, an action for damages arising out of said injuries. The city of Hammond is incorporated under the general laws of this State pertaining to the incorporation of cities. The damages sought to be recovered in the action were laid at \$500, the limit of the jurisdiction of said court under the laws of this State in an action for the recovery of money. It is shown that the defendant, by its attorneys, appeared to said action without any service of process. A jury was demanded and impaneled, and it returned a verdict in favor of the plaintiff for \$500. It is charged that this verdict was not returned upon any evidence given in the case, but was returned solely upon statements made to

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the jurors that \$500 was the amount agreed upon by the parties. A motion for a new trial was made by the defendant company, which was overruled, and judgment was thereupon rendered on the verdict of the jury. This judgment was immediately paid by the defendant company to appellant's father, who accepted same in full satisfaction of said judgment. The complaint contains many allegations of fraud and fraudulent representations made by appellee company herein and its agents, to induce appellant's father to commence said action as his next friend. It is shown, among other things, that the action was instituted by attorneys who were in the employ of the appellee at the time, and were not attorneys of the plaintiff, and did not in good faith represent him; that these agents and attorneys informed the judge of said city court "that a *bona fide* compromise and settlement of plaintiff's claim has been agreed upon, and upon said representations made to him the judge of said court entertained jurisdiction of said cause, but only in a formal manner; that plaintiff's father was not, and never has been, the legal guardian of plaintiff, and had no authority to compromise or adjust any claims which the plaintiff had against defendant on account of said injuries, and the question of the sufficiency of said settlement and compromise was not presented to said court, and was effected wholly without the knowledge and consent of plaintiff." At the time the action was commenced and judgment was rendered, appellant, by reason of his injuries, was confined in the hospital, suffering therefrom, and had no knowledge that said action had been instituted and a judgment rendered therein. As soon as he was informed of that fact he expressed his disapproval of said proceeding. It is further charged that the sum of \$500 was an amount grossly inadequate and insufficient to compensate the plaintiff for his injuries, etc. The pleading closes with the prayer that said judgment, rendered on November 15, 1902, as aforesaid disclosed, be declared

void, vacated and set aside, and for all other and proper relief. The city court of Hammond entertained jurisdiction in this action, and upon the trial rendered a judgment therein against appellant, and from this judgment he appealed to the Lake Superior Court, wherein there was a demurrer to the complaint overruled, an answer in several paragraphs filed by defendant and the demurrer thereto overruled, and on the issues joined there was a trial by court, and a judgment rendered against appellant, from which this appeal is prosecuted.

At the very threshold we are met with the contention of appellee's counsel that the city court of Hammond had no jurisdiction over the subject-matter of this action,

1. and hence this appeal cannot be considered or maintained. It is settled beyond successful controversy that if the city court in which this suit was commenced had no jurisdiction of the subject-matter, then, under the circumstances, the Lake Superior Court acquired no jurisdiction of the subject-matter by appeal. *Jolly v. Ghering* (1872), 40 Ind. 139; *Mays v. Dooley* (1877), 59 Ind. 287, and cases cited; *Horton v. Sawyer* (1877), 59 Ind. 587; *Brown v. Goble* (1884), 97 Ind. 86; *Myers v. Gibson* (1899), 152 Ind. 500.

In this State the courts of justices of the peace and city courts, like that in which this action was instituted, are of inferior and limited jurisdiction, and possess no

2. power or jurisdiction except that which is expressly conferred by the statute and such as is necessarily implied or incidental to the power or jurisdiction so conferred. *McNulty v. Connew* (1875), 50 Ind. 569, and cases cited; *Brown v. Goble*, *supra*.

It will be observed that under the facts alleged in the complaint the object of this suit is to set aside and vacate a judgment procured or obtained by the alleged

3. fraud of appellee. The ancient principle that fraud vitiates everything is applicable to judgments.

Adams School Tp. v. Irwin (1898), 150 Ind. 12; *State v. Hindman* (1903), 159 Ind. 586.

That a court of superior general jurisdiction may, upon sufficient facts, set aside and annul a judgment obtained by fraud, and relieve the party so defrauded there-

4. from, is a well-settled proposition. *Nealis v. Dicks* (1880), 72 Ind. 374; *Hogg v. Link* (1883), 90 Ind. 346; *Spahr v. Hollingshead* (1847), 8 Blackf. 415; *Nicholson v. Nicholson* (1888), 113 Ind. 131; *English v. Aldrich* (1892), 132 Ind. 500, 32 Am. St. 270.

As the power to set aside and annul judgments procured by fraud is lodged in courts of superior general jurisdiction,

which are invested with the power to grant relief in
5. equity or chancery cases, it is manifest that appellant in commencing his action in the city court of Hammond selected the wrong tribunal. While a city court, like that of a justice of the peace, in the trial of a cause over which it has jurisdiction of the subject-matter, should be guided and controlled by both legal and equitable principles, so far as applicable, nevertheless such a court possesses no equity or chancery jurisdiction, or powers which will authorize it to review and set aside either its own judgment or that of any other court on the ground that such judgment was obtained or procured by fraud.

Section 3669 Burns 1901, Acts 1891, p. 24, §2, of the statute governing the creation of city courts, like the one herein involved, provides, among other things, that

6. a city court "shall have original concurrent jurisdiction with justices of the peace and with city mayors in all matters criminal and civil of which justices of the peace or mayors have or may hereafter have jurisdiction. And shall also have original concurrent jurisdiction with the circuit court in civil causes where the amount in controversy does not exceed \$500, except in actions for slander, libel, foreclosure of mortgages on real estate or where the title of real estate is in issue, excepting all matters relating

to the settlement of decedents' estates, appointment of guardians and all matters connected therewith. Such court shall be governed, so far as may be, by the laws, rules, practice and pleadings governing proceedings in the circuit courts of the State, except as in this act is otherwise provided."

It will be noted that this statute invests city courts with original concurrent jurisdiction with justices of the peace and with the city mayor. By §3497 Burns 1901, §3062 R. S. 1881, the mayor of a city, in addition to the particular powers therein granted, is in civil actions invested, within the limits of the city, with the jurisdiction and powers of a justice of the peace. Turning to §1500 Burns 1901, §1433 R. S. 1881, we find that therein it is provided that "justices of the peace shall have jurisdiction to try and determine suits founded on contract or tort, where the debt or damage claimed or value of the property sought to be recovered does not exceed \$100, and concurrent jurisdiction to the amount of \$200, but the defendant may confess judgment for any sum not exceeding \$300. No justice shall have jurisdiction in any action of slander, for malicious prosecutions, or breach of marriage contract, nor in any action wherein the title to lands shall come in question, or the justice be related by blood or marriage to either party."

That a justice of the peace under the laws of this State is not invested with the powers of a court of equity, and is not authorized to assume jurisdiction and award relief in equity cases, as is a court of superior general jurisdiction, is settled by repeated decisions of this court. *Brown v. Goble*, *supra*, and cases cited; *Leary v. Dyson* (1884), 98 Ind. 317; *Greenwaldt v. May* (1891), 127 Ind. 511, 22 Am. St. 660.

In the latter appeal Judge Elliott, speaking for the court, said: "As the judgment for costs was obtained by fraud, equity will enjoin its collection, for the justice of the peace had no authority to review his own judgment on the ground

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of fraud. A justice of the peace possesses no equity jurisdiction and cannot set aside or annul his judgment, except in the mode provided by statute, and the statute does not authorize him to review a judgment. *Ainsworth v. Atkinson* [1860], 14 Ind. 538; *Snell v. Mohan* [1872], 38 Ind. 494; *Richards v. Reed* [1872], 39 Ind. 330; *Doyle v. State, ex rel.* [1878], 61 Ind. 324; *Brown v. Goble* [1884], 97 Ind. 86." In view of the statute conferring jurisdiction upon city courts, it is evident that if a justice of the peace has no equity jurisdiction, neither is a city court invested therewith.

An objection that a court has no jurisdiction of the subject-matter of the action cannot be waived either by the silence or express consent of the parties, and may be

7. interposed at any stage of the action. Where want of jurisdiction of the subject-matter is apparent upon the face of the proceedings or record in a cause, no formal motion is necessary to present that question to the court. *McCoy v. Able* (1892), 131 Ind. 417.

Such objection may be interposed for the first time in the Supreme Court on appeal. *Branson v. Studa-*

8. *baker* (1892), 133 Ind. 147; Elliott, App. Proc., §470; Ewbank's Manual, §7.

It must follow, and we so adjudge, that the city court of Hammond had no jurisdiction over the subject-matter of this action, and consequently the Lake Superior

9. Court acquired none thereover by the appeal. The cause is, therefore, remanded to the Lake Superior Court at the cost of appellant, with instructions to that court to vacate its judgment, and to permit appellant, if he desires, to dismiss the action; otherwise the appeal from the city court should be dismissed.

Gillett, J., did not participate in the decision of this cause.

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WURFEL v. THE STATE.

[No. 20,807. Filed October 4, 1906.]

APPEAL AND ERROR.—*Record.*—*Motion for New Trial.*—*Bill of Exceptions.*—A motion for a new trial, contained only in the bill of exceptions in the transcript on appeal, is not a part of the record; and error assigned on the overruling of same cannot be considered.

From Clark Circuit Court; *C. W. Cook*, Special Judge.

Prosecution by the State of Indiana against John Wurfel. From a judgment of conviction, defendant appeals. *Affirmed.*

James W. Fortune, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

MONTGOMERY, J.—Appellant was convicted of an assault and battery with intent to commit rape. A number of alleged errors, which might properly have been urged as grounds for a new trial, have been assigned. The only proper assignment of errors is the overruling of appellant's motion for a new trial. The motion for a new trial is not embraced in the record proper, but only in what purports to be a bill of exceptions. This bill of exceptions is not identified, but is merely attached to the transcript, and there is no record entry of the filing of the same. If it were conceded that this bill of exceptions constituted a part of the record, which we need not and do not decide, still it must be held that a motion for a new trial, which is copied in such bill, but does not appear elsewhere, is not properly a part of the record. *Wilson v. State* (1901), 156 Ind. 631, and cases cited.

In the absence of the motion for a new trial, no error is made to appear, and the judgment is affirmed.

ADAMS v. BETZ.

[No. 20,842. Filed October 4, 1906.]

1. **APPEAL AND ERROR.**—*Briefs.*—*Omissions by Appellant.*—*Supply by Appellee.*—Where the necessary parts of the record to present the errors assigned are not set out in appellant's brief, but the appellee's brief supplies same, such errors will be considered. p. 164.
2. **SAME.**—*Weighing Evidence.*—*Quieting Title.*—*Jury.*—The Supreme Court will not, under §641h Burns 1905, Acts 1903, p. 338, §8, weigh the evidence in a quiet-title case, since such case is triable by jury. p. 164.
3. **QUIETING TITLE.**—*Boundaries.*—*Parol Partition.*—Where heirs divide lands, giving to plaintiff fourteen acres from the west side of an eighty-acre tract, the other heirs selling their tracts to defendant's grantor, and the plaintiff and such grantor orally established the boundary line and built a fence thereon, maintaining the same ten years, the defendant purchasing from the grantor such tract, "except fifteen acres" off of the west end, such purchased tract containing sixty-five acres "more or less," plaintiff is entitled to a decree quieting his title to the lands up to such fence, especially since defendant knew of such division and since the other heirs and such grantor subsequently conveyed to him all land within the boundaries marked by such fence. p. 164.
4. **ACTION.**—*Parties.*—*Reformation of Instruments.*—*Deeds.*—*Quieting Title.*—Plaintiff, by joining his grantor with the adjoining owner as a codefendant, may have reformation of his deed to cover a certain tract intended to be included in such deed, and also quiet his title to such tract as against such adjoining owner. p. 168.
5. **NOTICE.**—*Possession.*—*Quieting Title.*—The possession of lands up to a fence is notice, to a purchaser of adjoining lands, of title by such possessor. p. 168.
6. **DEEDS.**—*Description.*—*Acres Conveyed.*—*"More or Less."*—The words "more or less" following the number of acres conveyed by a deed, usually characterize such number as matter of description and not of the essence of the contract. p. 169.
7. **PARTITION.**—*Parol.*—*Boundaries.*—*Estoppel.*—*Limitation of Actions.*—*Adverse Possession.*—A parol agreement, without fraud, fixing an unknown or disputed boundary line, acted upon by the parties, estops such parties or those claiming under

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them from afterwards disputing such line; and the possession held under such agreement need not be shown to be adverse for the period prescribed by the statute of limitations. p. 169.

8. **DEEDS.—Boundaries.—Disputed Title.**—Where a grantor conveyed certain lands, bounded by a fence, located, though erroneously, on the supposed line, said conveyance containing in fact fewer acres than was supposed, a subsequent deed by the grantor and others interested of the disputed tract beyond the fence puts at rest the title to said disputed tract as against any claims of the grantee of the lands bounded by such fence. p. 170.
9. **EVIDENCE.—Parol.—Contracts.—Boundaries.—Partition.**—In a suit to quiet title to lands enclosed by a fence, evidence of a parol agreement between plaintiff and defendant's grantor that such fence should mark the true boundary line between their lands, is admissible. p. 171.

From Randolph Circuit Court; *J. W. Macy*, Judge.

Suit by George Betz against James J. Adams. From a decree for plaintiff, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

John W. Headington, for appellant.

Fred S. Caldwell, *Emerson E. McGriff* and *James J. Morgan*, for appellee.

JORDAN, C. J.—Suit by appellee to quiet title to certain lands situated in Jay county, Indiana, described as fifteen acres off of the entire west end of the north half of the northeast quarter of section twenty, township twenty-four north, range fifteen east, more particularly described by metes and bounds. The suit was originally commenced and tried in the Jay Circuit Court, and resulted in a finding and judgment in favor of appellee. A new trial under the statute was granted to appellant, and on his motion the cause was venued to the Randolph Circuit Court.

Appellant by his answer to the complaint disclaimed any interest to a certain part of the lands described. He filed a cross-complaint, making the appellee the sole defendant thereto, wherein he alleged that on December 2, 1902, he

purchased certain real estate from Joseph M. Minch, at that time the owner thereof, in consideration of the sum of \$3,000; that Minch and wife executed to him a warranty deed for the following described real estate, situated in Jay county, Indiana: The north half of the northeast quarter of section twenty, township twenty-four north, range fifteen east, except fifteen acres off of the entire west end of said tract. Appellant further alleged in his cross-complaint that at the time of said conveyance by Minch the latter was the owner of sixty-five acres of land, more or less, which land is described in the cross-complaint by metes and bounds, and it is alleged that this land is the tract which Minch intended to convey to appellant, but by reason of a mutual mistake of said grantor and grantee, and the scrivener who drafted the deed, the land was described as the north half of the northeast quarter, etc., setting out the description as hereinbefore given; that, by reason of said mistake, the deed executed by Minch and wife to appellant did not convey to him all the land which he purchased and which was intended by his said grantor to be conveyed to him. It is further averred that appellee, "for the purpose of cheating and defrauding the plaintiff of a part of his land, procured said Joseph M. Minch to make and execute to him a quitclaim deed for fifteen acres off of the entire west end of the west half of the northeast quarter of section twenty, township twenty-four north, range fifteen east, in Jay county, Indiana, which casts a cloud upon a part of plaintiff's title." The prayer of the cross-complaint is that appellant's title to the lands therein described by metes and bounds be quieted, and for all other and proper relief. Upon the issues joined there was a trial by the court and a finding in favor of appellee, and, over appellant's motion for a new trial, a decree was entered quieting appellee's title to the lands in controversy.

The only error assigned in this appeal is that the court erred in overruling the motion for a new trial. No errors

raising the sufficiency of the complaint are assigned.

1. Those discussed by appellant's counsel are that the finding of the trial court is not sustained by the evidence and is contrary thereto, and that the court erred in admitting certain evidence. Appellee's counsel insist that none of the points presented by appellant should be considered, for the reason that he has not complied with rule twenty-two of this court in the several respects mentioned, especially in his failure to set forth the evidence as required by said rule. This contention is in the main verified by an examination of appellant's brief, and were it not for the fact that counsel for appellee in their brief have, at least in part, supplied the omission of appellant we would dismiss the appeal without consideration. Appellant

requests that this court, under the provisions of section eight of the act of 1903 (Acts 1903, p. 338, §641h Burns 1905), weigh the evidence and award judgment in accordance with the weight thereof. A suit, however, to quiet title to real estate is triable by a jury (*Puterbaugh v. Puterbaugh* [1892], 131 Ind. 288, 15 L. R. A. 341, and cases cited), consequently section eight of the statute in question does not apply to the case at bar, for by its express provision it is limited to cases not triable by a jury as a matter of right.

There is evidence in the record to establish the following facts: The eighty acres of land out of which the tract in controversy was carved was originally owned in fee

3. simple by Jackson F. Betz. He died intestate the owner thereof, leaving appellee, his son, and five other children as his only heirs at law. After his death these children made partition of the eighty acres by executing to each other partition deeds. The part now claimed by appellee was set off to him in this partition, and, as it appears, was intended to embrace fifteen acres, excepting one acre which was held by Wabash township for school purposes, and which was subsequently, and prior to the

commencement of this suit, purchased by appellee and conveyed to him by the proper township trustee. He was in possession of the premises and was residing thereon with his family at the time Joseph M. Minch became the owner of the remainder of the land through deeds of conveyance executed to him by the brothers and sisters of appellee. When Minch became the owner of the land lying east of the part occupied and claimed by appellee there was no partition fence or other dividing line between the two tracts, namely the one purchased by Minch and the one held by appellee. Thereupon Minch and appellee agreed to establish a boundary line and erect a partition fence thereon. Minch recognized that appellee owned fifteen acres of the eighty-acre tract, fourteen of which he had acquired as an heir of his father, and which had been set off to him under the partition heretofore mentioned, and the other acre which he had purchased from the township trustee as heretofore stated.

The man whom Minch selected to represent him, together with appellee, made measurements of the land and ran a division or boundary line north and south. The parties then by agreement constructed a wire fence on this agreed boundary line, which divided the lands of Minch on the east and those of appellee on the west. Minch acquiesced in this division and was fully satisfied that he had his portion of the eighty acres, and during the ten years and more in which he owned and held the lands adjacent to those of appellee he recognized and accepted the fence so erected and maintained, and acted upon by the parties, as the true dividing line, and never in any manner disputed nor called the same in question. Minch during the entire period of his ownership after the erection of this partition fence cultivated the lands on the east of this fence, and appellee likewise cultivated the land lying west thereof up to the fence. Appellant long prior to his purchase from Minch resided in the immediate vicinity of these lands, and

at and before his said purchase saw this boundary or division fence and saw and knew that Minch and appellee cultivated the lands on each side thereof to said fence.

On December 2, 1902, Minch and wife, in consideration of \$2,800, sold and conveyed to appellant by warranty deed the land situated east of this boundary or partition fence. This deed described the land as follows: "The north half of the northeast quarter of section twenty, township twenty-four north, range fifteen east, except fifteen acres off of the entire west end thereof," stating that the land therein conveyed was sixty-five acres, "more or less." It was further stipulated in this deed that the land was conveyed to appellant by Minch subject to a mortgage of \$3,000, executed to the Dickson Lumber Company, which mortgaged indebtedness appellant in the deed assumed and agreed to pay.

During the negotiations between Minch and appellant for the sale and purchase of the land, and prior to the execution of the deed thereto, a paper containing a description of the land which Minch proposed to sell and convey to appellant was placed in the hands of the latter. The description therein contained and set out excepted from the conveyance the following real estate: "A strip or parcel of land containing fifteen acres off of the entire west end of said tract above described, now owned by George Betz." After the sale and conveyance of the land by Minch to appellant the latter discovered, through a survey which he procured to be made, that if the tract conveyed to him by Minch covered or embraced sixty-five acres it would be necessary to change the boundary line so as to extend it two rods west of the old boundary fence agreed upon and erected, as hereinbefore stated, by Minch and appellee. The latter about the same time discovered that he had not fully acquired title to the fifteen acres which he claimed, or to all of the land lying west of said boundary or partition fence; or, in other words, he discovered that there was a strip of land two rods wide extending along the entire

width of the eighty-acre tract at the east end of the supposed fifteen acres which was not covered by the partition deed executed to him by his brothers and sisters. He immediately procured from Minch for a nominal consideration a quitclaim deed covering and embracing this strip, and also procured a warranty deed from his brothers and sisters conveying this strip to him. This latter deed, as the evidence discloses, was made for the purpose of correcting the former partition deed.

Thereafter appellant continued to claim title to this strip, insisting that there was a mistake in the description contained in the deed of Minch and wife to him, his insistence being that the land should have been described in the Minch deed by metes and bounds; that Minch's grantors had conveyed more land to Minch than the latter had conveyed to him. Appellant thereupon, over the objections of appellee, began to build a division fence on the land claimed by appellee, erecting it two rods west of the old boundary fence. Appellee then instituted this action.

A consideration of the evidence in this case thoroughly satisfies us that the judgment of the lower court is a correct result. The facts established thereby clearly disclose that appellee is the legal owner of the land in dispute, and is entitled to have his title thereto quieted and set at rest as against the claims made by appellant. Counsel of the latter, however, insist that the evidence shows that Minch by his conveyance to appellant intended to sell and convey all of the land which he owned and held in and to the eighty-acre tract by virtue of the conveyance to him by the children and heirs of Jackson F. Betz, to which we have herein referred, further contending that it was the intention of both appellant and Minch to have such a description in the deed executed by the latter to the former as would embrace or cover all the lands so owned by Minch; that the exception of fifteen acres off the entire west end of the tract conveyed was a mutual mistake, and that, therefore, appellant, under

his cross-complaint, is entitled to have said deed reformed so as to comply with the intention of the parties.

It is true that if the appellant had made Minch, his grantor, a codefendant with appellee to a cross-complaint in this action, he might thereunder, on a sufficient

4. showing, have secured a reformation of the deed of conveyance to him from Minch so as to cover all of the real estate intended by the parties at the time of the sale to be conveyed, and then had his title thereto quieted as against appellee. *Smith v. Kyler* (1881), 74 Ind. 575; *Hunter v. McCoy* (1860), 14 Ind. 528; §280 Burns 1901, §279 R. S. 1881. The trial court, however, appears to have found adversely to appellant on all the issues which he tendered by his cross-complaint, and the evidence fully supports this finding. Minch on the trial testified that he intended to convey to appellant only the land which he owned lying east of the boundary fence between him and appellee. Other evidence in the case fully corroborates his testimony in this respect.

As heretofore stated in our summary of the evidence, it appears that sometime before the execution of the deed from Minch to appellant the latter was given a paper

5. containing a description of the real estate which Minch intended to convey. The description therein contained excepted a strip or parcel of land containing fifteen acres owned by George Betz, the appellee herein, off of the entire west end of the tract to be sold and conveyed. Appellant, when he purchased the land, saw the boundary or partition fence in question, and knew that appellee was in possession of the land west thereof, and saw that Minch and he cultivated their lands up to the fence on their respective sides. These facts were sufficient notice to appellant to put him upon inquiry as to appellee's claim or right in the land west of the fence. *Kinsey v. Satterthwaite* (1882), 88 Ind. 342; *Barnes v. Union School Tp.* (1883), 91 Ind. 301.

As is shown, a definite piece of land—fifteen acres—was excepted by Minch in his deed to appellant from that portion of the eighty acres which he conveyed. The

6. part conveyed was stated to be sixty-five acres, “more or less.” The authorities as a general rule affirm that where it appears in a deed of conveyance of land by the qualifying words “more or less,” the statement of the number of acres in the deed is a mere matter of description, and not of the essence of the contract, the purchaser, in the absence of fraud, takes the risk as to the quantity of acres conveyed to him. *Tyler v. Anderson* (1886), 106 Ind. 185; *Moore v. Harmon* (1895), 142 Ind. 555.

Appellant contends that the boundary line established under the agreement between Minch and appellee could not alone operate to give any title to lands west of said

7. line with which appellee was not invested at the time the line was so established. It is disclosed, however, that at the time the boundary line in question was established by Minch and appellee there had been no definite or certain division line located between their respective tracts. It appears from the evidence that each of these parties in good faith located and established what they believed to be a true division line between their adjoining tracts of land. This line, after it was located, was, for at least a period of ten years prior to the sale by Minch to appellant, recognized and accepted by each of the owners as the true dividing line between them. The line was under the circumstances what may be termed a practical location of the boundary line, and certainly, if not conclusive in respect to the boundaries of the respective premises, it afforded strong evidence as against either Minch or appellee, and all persons claiming through or under them, that it was the true boundary or dividing line of the lands in question. 5 Cyc. Law and Proc., 930-935.

As a general rule, it is affirmed by the authorities that where owners of adjoining premises establish by agreement

a boundary or dividing line between their lands, take and hold possession of their respective tracts, and improve the same in accordance with such division, each party, in the absence of fraud, will thereafter be estopped from asserting that the line so agreed upon and established is not the true boundary line, although the period of time which has elapsed since such line was established and possession taken is less than the statutory period of limitation. 1 Cyc. Law and Proc., 1036; 5 Cyc. Law and Proc., 930-935; *St. Bede College v. Weber* (1897), 168 Ill. 324, 48 N. E. 165; *Tate v. Foshee* (1889), 117 Ind. 322; *Pitcher v. Dove* (1885), 99 Ind. 175, and authorities cited; *Meyers v. Johnson* (1860), 15 Ind. 261. The general rule recognized by the authorities is that a boundary line located under such circumstances, in the absence of fraud, becomes binding on the owners establishing it; not on the principle that the title to the lands can be passed by parol, but for the reason that such owners have agreed permanently upon the limits of their respective premises, and have acted in respect to such line, and have been controlled thereby, and, therefore, will not thereafter be permitted to repudiate their acts.

But appellee need not and does not base his right to the strip of land in dispute upon the location of the boundary line in question, for appellant virtually concedes

8. that the deed of conveyance from Minch to him did not cover the strip of ground in controversy, and as appellant under the evidence has not presented a case entitling him to have the Minch deed reformed, and as Minch and the brothers and sisters of appellee, some time before the commencement of this action, conveyed to him all of the interest and title which they or either of them had in and to the land here in controversy, therefore, whatever infirmity or deficiency may have previously existed in respect to appellee's title to the strip of ground involved has been cured by said conveyances.

Appellant complains of the action of the trial court in permitting parol evidence to be introduced relative to the establishment of the old boundary line by Minch

9. and appellee. It is contended that what was done by these parties in establishing said line was done in the absence of appellant and without his knowledge, and that no record was made to notify subsequent purchasers of the location of this line. But as heretofore stated, after the location of the line by Minch and appellee a partition fence was erected and maintained thereon by said parties for a period of over ten years, each cultivating his respective premises to this fence. This was the condition of affairs at the time appellant made his purchase. These facts, as previously asserted, were sufficient notice to appellant. A valid agreement between owners of lands locating a boundary line between them is binding upon each and all persons claiming under or through them, or either of them. 5 Cyc. Law and Proc., 933. There was no error in admitting the evidence in question. *Pitcher v. Dove, supra*.

Some minor rulings of the court are called in question, but these, if they be conceded to be erroneous, were harmless, and could have exerted no influence over the decision of the trial court.

Judgment affirmed.

McSWANE v. FOREMAN ET AL.

[No. 20,450. Filed October 5, 1906.]

1. **DISCOVERY.—Examination of Parties.—Refusal.—Contempt.—Appeal and Error.**—A proceeding for contempt for refusal to comply with §521 Burns 1901, §513 R. S. 1881, providing that if a party refuse to attend and be examined prior to a trial, he "may be punished as for a contempt," is governed, as to procedure, by §1025 Burns 1901, §1013 R. S. 1881, providing for punishment of persons guilty of indirect contempt and giving a right of appeal. p. 174.

2. **DISCOVERY.—Parties.—Examination.—Refusal.—Contempt.—Indirect.—Appeal and Error.**—The punishment of a party, by striking out his complaint for refusing to be examined as provided by §521 Burns 1901, §513 R. S. 1881, is governed, as to an appeal, by that provision of §1023 Burns 1901, §1011 R. S. 1881, which gives the defendant the right to “except to the opinion and judgment of the court.” p. 175.
3. **APPEAL AND ERROR.—Right of, in Contempt.—Statutes Governing.**—The right of appeal in cases of contempt, except where a fine of “\$50 or more” or imprisonment is imposed (§1023 Burns 1901, §1011 R. S. 1881), is governed by the general statutes concerning appeals. p. 175.
4. **CONTEMPT.—Indirect.—Examination of Parties.—Refusal.—New Trial.**—In a case of indirect contempt for a party’s refusal to be examined, as prescribed by §521 Burns 1901, §513 R. S. 1881, a motion for a new trial is not necessary to present the case on appeal, since the sole question to be decided is whether the party has fully answered the charge made. p. 175.
5. **APPEAL AND ERROR.—Contempt.—Indirect.—Examination of Parties.—Refusal.—Striking Out Complaint.—Exceptions.**—An exception to the “opinion and judgment of the court,” assigned as error on appeal, in a case of indirect contempt, wherein the court struck out plaintiff’s complaint under §521 Burns 1901, §513 R. S. 1881, for his refusal to be examined as a witness before trial, properly presents the question of the correctness of the court’s ruling below. p. 176.
6. **TRESPASS.—Entry of House by Legal Process.—Examination of Party.—Discovery.**—Plaintiff may lawfully refuse to permit defendant’s attorneys and a notary public to enter his house for the purpose of taking his examination as a party to his action. p. 176.
7. **PLEADING.—Answer.—Conclusiveness of.—Contempt.—Indirect.**—Defendant’s answer in a proceeding for an indirect contempt imports absolute verity, and must be so considered by the court. p. 177.
8. **CONSTITUTIONAL LAW.—Substantive Rights.—Procedure.**—Substantive rights protected by the Constitution are of primary importance to the courts, the procedure or method of attaining them being secondary and subordinate. p. 177.
9. **TRESPASS.—Entry of House.—Breach of Legal Right.—Matters in Aggravation.**—The invasion of a person’s right to security and liberty constitutes a trespass; and wrongs done after such invasion are merely in aggravation of such trespass. p. 177.

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10. **TRESPASS.—Waiver.—Entry of House by Legal Process.—Examination of Party.**—The process served upon a party requiring him to submit to an examination as a witness in his own house is invalid, and he does not waive his right to object thereto by failing to refuse permission at the time of service, his abandonment of the house and locking the door being sufficient notice of refusal. p. 178.

From Posey Circuit Court; *O. M. Welborn*, Judge.

Action by Sylvester F. McSwane against Orville P. Foreman and another. From a judgment for defendants, plaintiff appeals. *Reversed.*

Thomas W. Lindsey and *Fred P. Leonard*, for appellant.
Hatfields & Hemenway, for appellees.

GILLET, J.—On the motion of appellee Bowker Fertilizer Company the court below struck appellant's complaint from the files and dismissed his action, on the ground of a failure to give his examination as a party. This ruling is assigned as error.

Both the notice to appellant as a party and the subpoena issued for him as a witness provided for the taking of his examination at his dwelling-house, twelve or fourteen miles in the country. It appears without dispute that appellant's family consisted of his wife and five children, and that they dwelt in a house of three rooms; that there was no place therein to accommodate the attorneys and the notary public who would have been required to attend said examination; that appellant's wife was of a highly nervous temperament, easily excited, and easily embarrassed before strangers, and that it would have been very embarrassing to her and the other members of appellant's family to have had said examination taken there; that appellant had been advised by his attorneys that, as a matter of constitutional right, he was authorized to deny access to his home to the persons seeking to examine him; that for said reason, and because of his belief that the notice or subpoena for him to attend as a witness was insufficient, he absented himself

from his home on the day in question, and that when said appellees' attorneys and the notary public appeared there, within the hours fixed, for the purpose of taking said examination, they found the house locked, and that there was no one about the premises. When the notice to take said examination was served on appellant's attorneys, they objected to the place fixed, but we infer that the only objection stated was that it necessitated a trip into the country. The advice which said attorneys gave their client concerning his constitutional right was given after the subpoena of the notary public had been served. At the time the notice of the taking of said examination was served on appellant's attorneys, they informed opposite counsel that their client was willing to appear at any time and place away from his own home for the purpose of being examined, and the counter-showing concluded with a renewal of such offer. It is alleged in the affidavits in support of a motion to strike out that said appellees' attorneys, on the day said examination was to be taken, met one of the attorneys for appellant in the town of Boonville, and he merely informed them that he had been called away on business, and would not attend the examination. From the silence of the affidavits which constituted the showing by appellees, we infer that the grounds on which appellant based his refusal to give his examination at the place fixed were not stated to the other side. Apparently he was content simply to absent himself, acting on the advice of counsel, because the place fixed for the taking of the examination was objectionable to him for the reasons stated.

The contention is interposed on behalf of said appellees that the question which appellant seeks to present by his assignment of errors ought to have been raised by a

1. motion for a new trial. Section 521 Burns 1901, §513 R. S. 1881, provides that any party refusing to attend and testify, as provided in the prior sections, "may be punished as for a contempt; and his complaint,

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answer, or reply may be stricken out.” The proceeding, being for an indirect contempt, is governed as to the procedure by §1025 Burns 1901, §1013 R. S. 1881. That section provides for an appeal to this court as in cases of direct contempt. In a proceeding of the latter character, provision is made by §1023 Burns 1901, §1011 R. S. 1881, for the right, where the defendant to such proceeding has been adjudged to pay a fine of \$50 or more, or to be imprisoned, to move the court to reconsider its opinion and judgment upon the facts before it, or upon the affidavits of any or all persons who were present and heard or saw the conduct alleged to constitute the contempt. The punishment of striking out the complaint and dismissing the action is not such a punishment as is provided for

2. by the provision just mentioned, and falls within the earlier and more general language of said section, by which it is provided that the person found guilty of contempt may “except to the opinion and judgment of the court.” No doubt the right to appeal in
3. such a case is governed by the general statute concerning appeals.

In a case of this character, which falls without the provision concerning the special cases mentioned in §1023, *supra*, we are of opinion that a motion for a new

4. trial is unnecessary. The proceeding is summary, and there is really no trial within the provisions of the code governing motions for a new trial. The sole question before the court in such a matter, the contempt charged being indirect, is whether the party has fully answered the charge made against him. *State v. Earl* (1872), 41 Ind. 464; *Burke v. State* (1874), 47 Ind. 528; *Wilson v. State* (1877), 57 Ind. 71; *Fishback v. State* (1891), 131 Ind. 304; *Stewart v. State* (1895), 140 Ind. 7. In such a case there would be no more occasion for a retrial than there would be where a cause was submitted as an agreed case. The question would be simply one of law—in the first in-

stance, as to whether the facts constituted a cause of action; in the other, as to whether the party had purged himself by his showing. See *Fisher v. Purdue* (1874), 48 Ind. 323; *State, ex rel., v. Board, etc.* (1879), 66 Ind. 216; *Lofton v. Moore* (1882), 83 Ind. 112; *Witz v. Dale* (1891), 129 Ind. 120. Besides, the ruling striking out the complaint bears a closer resemblance to a ruling

5. applying to the pleadings than to the trial proper.

As was said in *Cates v. Thayer* (1883), 93 Ind. 156: "Issues are always, where a proper course is pursued, closed before trial, and what is closed with the pleadings must be regarded as belonging to them rather than to matters connected with the trial." We are of opinion that the exercise of the right given by the statute "to except to the opinion and judgment of the court" saves the question, and that that ruling may be made the basis of an assignment of errors.

Taking up the main question, there can be no doubt that it was the right of appellant to exclude the attorneys for said appellees and the notary public from his house.

6. The tenderness of the common law for the right of privacy and personal security, which finds expression in the maxim "every man's house is his castle," does not call for a panegyric on our part; it suffices to say that as in earlier times the right of the subject stood over against the possibility of the abuse of executive authority, so under modern conditions the right is a check upon the undue exercise of the powers of government generally. Second only to exemption from arbitrary control of the person is the security of the citizen in his home, and so fundamental is the principle that it has been given expression in the fourth amendment to the United States Constitution and in §11 of the Bill of Rights of Indiana, the first operating as a check upon the federal government, while the other has a like operation as against the State. Counsel for appellees admit their lack of right to examine appellant in

his own home if he had at the time availed himself of his privilege. They contend, however, that the claim advanced by him in response to the rule to show cause was an afterthought, and also that he should have notified them of his objection prior to the time fixed for his examination, or have asserted his objection to the invasion when threatened.

As to the statement that the claim was an after-

7. thought, it is sufficient to say that the showing made by appellant, which, for the purposes of a proceeding for indirect contempt, imports absolute verity, shows the contrary. As to the further claim, we have to say that as the courts are not disposed to give a close and literal construction to those provisions of the fundamental

8. law which are designed to stand as bulwarks in support of individual liberty, so, in their application, the right is regarded as the principal thing, and, if the means resorted to by the citizen for the assertion of his privilege is reasonably adapted to the end, that is all that is required. *Boyd v. United States* (1886), 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. In the case last cited, a statute which provided that books, papers and invoices should be produced, on motion of the attorney for the government, or else the allegations of the motion should be taken as true, was held unconstitutional, as applied to an action to declare goods forfeited under the revenue laws, as violative of both the fourth and fifth amendments to the federal Constitution. Mr. Justice Bradley, in deciding that case, after quoting at length from Lord Camden's celebrated opinion in *Entick v. Carrington* (1765), 19 How. St. Tr. 1029, said: "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete

9. form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life.

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right to personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other."

In view of the above case, we are justified in saying that the process of the examining officer was ineffectual to command appellant to give his examination within the

10. precincts of his own house, so that the invalidity of the proceeding went to the very process itself. As we conceive, the right being the principal thing, appellant could be deprived of his privilege in respect to his home only by a waiver thereof. It might have been more courteous to opposite counsel had they been informed of appellant's intention to disregard the process and of his reasons therefor; but it cannot successfully be asserted that any act, either of himself or of his attorneys, amounted in law to a relinquishment of his right. His conduct in locking the house and departing was not only the very antithesis of a waiver, but was a direct means of asserting his constitutional prerogative.

The order and judgment striking the complaint from the files and dismissing the action is reversed, at the cost of the party procuring said order.

PADGETT v. THE STATE.

[No. 20,828. Filed October 9, 1906.]

1. **INDICTMENT AND INFORMATION.**—*Assault and Battery with Intent.*—An affidavit charging that defendant did “unlawfully, feloniously, purposely and with premeditated malice, and in a rude, insolent and angry manner, unlawfully and feloniously touch, cut, beat and strike with his fist, and with a knife * * * , with the intent then and there and thereby him, the said Harry Wolfe, unlawfully, purposely and with premeditated malice to kill and murder,” does not state an offense, since it fails to show that any person was assaulted. p. 180.
2. **SAME.**—*Motion in Arrest.*—*Criminal Law.*—An affidavit containing all of the essentials of a crime, though the facts are defectively charged, is good on motion in arrest of judgment, such defects being reached only by a motion to quash. p. 181.
3. **SAME.**—*Motion in Arrest.*—*Motion to Quash.*—An affidavit omitting an essential fact of the crime charged is bad on motion to quash or on a motion in arrest of judgment. p. 182.
4. **SAME.**—*Certainty.*—*Statutes.*—Under §§1832, 1833 Burns 1905, Acts 1905, pp. 584, 625, §§191, 192, providing as to the sufficiency, and against the quashing of, defective affidavits and indictments, reasonable certainty is necessary in charging a crime. p. 182.
5. **SAME.**—*Names of Injured Persons.*—*Identification.*—The name of the injured person, or a sufficient reason for the failure to give same, where required in the indictment or information, must be set out in order to identify the transaction, the omission thereof rendering such charge bad on motion to quash or on motion in arrest. p. 183.
6. **SAME.**—*Intendments.*—*Doubts.*—No intendments are made in aid of a criminal charge; and all doubts are resolved in favor of the accused. p. 184.

From Daviess Circuit Court; *H. Q. Houghton*, Judge.

Prosecution by the State of Indiana against Charles Padgett. From a judgment of conviction, defendant appeals. *Reversed.*

John H. Spencer and *Alvin Padgett*, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

JORDAN, C. J.—This prosecution was commenced on February 5, 1906, by the State of Indiana, through its proper prosecuting attorney, by filing an affidavit in the lower court, wherein it was sought to charge appellant with having committed the crime of assault and battery with intent to commit murder. He waived an arraignment and entered a plea of "not guilty." There was a trial by jury, and a verdict returned, finding him guilty of assault and battery with intent to kill, as charged in the affidavit, and that he was of the age of twenty-eight years. He filed a written motion in arrest of judgment, alleging therein that the facts stated in the affidavit do not constitute a public offense. This motion, over the exception and objection of appellant, the court denied, and thereupon rendered a judgment upon the verdict, sentencing the appellant to be committed to the Indiana Reformatory for a period of not less than two nor more than fourteen years, and fining him in the sum of \$5, etc. From this judgment he prosecutes this appeal, assigning that the court erred in overruling the motion in arrest of judgment.

The affidavit upon which appellant was tried

1. and convicted, omitting the formal parts, is as follows:

"Harry Wolfe swears that Charles Padgett, late of the county of Daviess, State of Indiana, on or about the 2d day of February, 1906, did then and there, at and in said county and State aforesaid, unlawfully, feloniously, purposely, and with premeditated malice, and in a rude, insolent, and angry manner, unlawfully and feloniously touch, cut, beat, and strike with his fist and with a knife, which said Charles Padgett then and there had and held in his hand, with intent then and there and thereby him, said Harry Wolfe, unlawfully, purposely, and with premeditated malice to kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

It is evident that the crime which the pleader attempted to charge in this affidavit was that of an assault and battery with an intent to commit murder in the first degree. It is certainly manifest that the affidavit is fatally deficient for the reason that it wholly fails to charge the commission of assault and battery upon any person. It merely charges that Charles Padgett, late of Daviess county, State of Indiana, on the date named, did then and there, at and in said county and State, "unlawfully, feloniously, purposely, and with premeditated malice, and in a rude, insolent, and angry manner, unlawfully and feloniously touch, cut, beat, and strike with his fist and with a knife, * * * with the intent then and there and thereby him, said Harry Wolfe, unlawfully, purposely, and with premeditated malice to kill and murder." The mere fact that the accused did "in a rude, insolent, and angry manner, touch, cut, beat, and strike with his fist and with a knife," falls far short of charging an assault and battery, without showing that some person named was "assaulted," "touched," "cut," and "beat" by the accused. The fact that he perpetrated these acts "with the intent thereby him, said Harry Wolfe, purposely to kill and murder" is certainly not sufficient to show that the latter was the person assaulted, unless we resort to a surmise or conjecture, and this we are not permitted to do.

By §354 of an act concerning public offenses, approved March 10, 1905 (Acts 1905, pp. 584, 661, §1997 Burns 1905), an assault and battery

2. is defined as follows: "Whoever, in a rude, insolent or angry manner, unlawfully touches another, is guilty of an assault and battery, and, on conviction, shall be fined," etc. Section 352 of the same act (§1995 Burns 1905) provides: "Whoever perpetrates an assault or an assault and battery upon any human being, with intent to commit a felony, shall, on conviction, be imprisoned in the state prison not less than two

years, nor more than fourteen years, and be fined not exceeding \$2,000.” Section 283 of said act (§1924 Burns 1905) provides that a motion in arrest of judgment may be granted by the court “where the facts stated in the indictment or affidavit do not constitute a public offense.” It is contended by the State that the infirmity of the affidavit in question is of such a character that it was cured by the verdict of the jury, and that therefore the motion in arrest was properly denied. It is true that if the affidavit could be said to contain all of the essential elements constituting a public offense, then, although the facts therein alleged may have been defectively stated, nevertheless, under the circumstances, the pleading would be sufficient to withstand a motion in arrest of judgment. *Lowe v. State* (1874), 46 Ind. 305; *Greenley v. State* (1877), 60 Ind. 141; *Graeter v. State* (1886), 105 Ind. 271; *Chandler v. State* (1895), 141 Ind. 106. It is settled that uncertainties existing in a criminal pleading in the statement of the facts constituting the offense can only be assailed by a motion to quash, and not by one in arrest of judgment. *Stewart v. State* (1888), 113 Ind. 505; *Chandler v. State, supra*.

But where the pleading does not contain all of the essential elements constituting a public offense, either a motion to quash or one in arrest of judgment must be sustained. *Hoover v. State* (1887), 110 Ind. 349; *Hanrahan v. State* (1877), 57 Ind. 527; *Nichols v. State* (1891), 127 Ind. 406.

Section 1832 Burns 1905, Acts 1905, pp. 584, 625, §191, provides: “The indictment or affidavit is sufficient if it can be understood therefrom: * * * Fourth. That
4. the offense charged is clearly set forth in plain and concise language, without unnecessary repetition.
Fifth. That the offense charged is stated with such a degree of certainty, that the court may pronounce judgment upon a conviction according to the right of the case.” The

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next section (§1833 Burns 1905) provides that "no indictment or affidavit shall be * * * quashed, nor shall the trial, judgment or other proceeding, be stayed, arrested or in any manner affected for any of the following defects: [Enumerating certain defects.] Tenth. For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Under these provisions of the statute, an indictment or affidavit is required to charge the offense with reasonable certainty. *Waggoner v. State* (1900), 155 Ind. 341, 80 Am. St. 237.

The injured party, or any other person whose name it is essential to set out in charging an offense, must, if known,

be stated in the indictment or affidavit with certainty. This requirement is necessary in order to identify or give certainty to the transaction or offense upon which the pleading is based. In other words, the law exacts that the name of the person upon whom the offense was committed shall be given in the pleading, in order that the accused party may be fully advised in respect to the crime which he is charged to have committed. 1 Archbold, *Crim. Proc. and Plead.* (7th ed. by Waterman), *79; *Black v. State* (1877), 57 Ind. 109; *McFarland v. State* (1900), 154 Ind. 442, and cases cited; *McBeth v. State* (1874), 50 Miss. 81; *State v. Bitman* (1862), 13 Iowa 485; *Ranch v. State* (1879), 5 Tex. App. 363; Gillett, *Crim. Law* (2d ed.), §129.

In fact, the name of the injured party is an essential element in the description of a public offense, and the failure to disclose who such person was, in the absence of a sufficient excuse being stated, is a fatal omission, and renders the pleading bad on a motion to quash or in arrest of judgment. *McFarland v. State*, *supra*, and cases cited; *McLaughlin v. State* (1875), 52 Ind. 279.

Certainly then, when tested by the authorities cited, there can be no sufficient charge of an assault and battery,

or of an assault and battery with the intent to commit a felony, without giving or stating, if known, the name of the injured person, for in a criminal pleading nothing can be taken by intendment, and all reasonable doubts which may arise upon the averments therein must be solved in favor of the accused party. *Funk v. State* (1898), 149 Ind. 338.

It is evident for the reasons stated that the affidavit in this case is fatally defective, and the court erred in overruling the motion in arrest of judgment, for which error the judgment is reversed and the cause remanded, with instructions to the lower court to sustain said motion.

HOWARD v. ADKINS.

[No. 20,863. Filed October 10, 1906.]

1. **APPEAL AND ERROR.**—*Briefs.*—*Supreme Court Rules.*—Where appellant has made a good-faith effort to comply with the Supreme Court rules in the preparation of his brief, and has set out substantially the parts of the record questioned, his errors assigned will be considered. p. 186.
2. **CONTRACTS.**—*Frauds, Statute of.*—*Real Estate.*—*Description.*—*Evidence.*—*Parol.*—Where the description of real estate, in a contract for the sale thereof, is consistent but incomplete, and its completion neither requires the contradiction or alteration of the description given, nor that a new description be introduced, parol evidence may be received to complete the description and identify the property. p. 187.
3. **EVIDENCE.**—*Parol.*—*Contracts.*—*Application of, to Subject-Matter.*—Parol evidence is admissible to apply a contract to its subject-matter. p. 188.
4. **SAME.**—*Parol.*—*Contracts.*—*Construction.*—*Frauds, Statute of.*—Contracts within the statute of frauds being construed, like other contracts, in the light of their surroundings, parol evidence is admissible to show such surroundings. p. 188.
5. **CONTRACTS.**—*Sales.*—*Real Estate.*—*Description.*—*Frauds, Statute of.*—The description: "120 acres of land, more or less,

167	184
167	275
108	533

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171	577

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owned by Daniel V. Howard of Dana, Indiana, and located about three miles west of Winamac, Pulaski county, Indiana, in sections seventeen and eighteen, township thirty north of range two west," in a contract for the sale of real estate, is *prima facie* sufficient. p. 189.

6. PLEADING. — *Complaint.* — *Contracts.* — *Sales.* — *Real Estate.* — *Description.* — *Two Tracts Answering.* — *Defense.* — A complaint for damages for the breach of a contract for the sale of "120 acres, owned by" defendant in certain sections, does not need to allege that defendant had no other land of like area in such sections, such fact being a proper defense. p. 190.
7. CONTRACTS. — *Written.* — *Consideration.* — *Frauds, Statute of.* — *Statutes.* — *Evidence.* — *Parol.* — Under §6630 Burns 1901, §4905 R. S. 1881, the consideration for a written contract need not be stated in the writing, but may be proved by parol. p. 190.
8. EVIDENCE. — *Parol.* — *Consideration.* — *Indefinite.* — *Contracts.* — *Written.* — Parol evidence is admissible to clear up an ambiguity in the written statement of the consideration of a written contract. p. 190.
9. CONTRACTS. — *Implications of Law.* — *Whether Part of.* — What the law implies in a contract is as much a part thereof as if written therein. p. 190.
10. SAME. — *Definiteness.* — *Exchange of Property.* — A contract by which plaintiff agreed to exchange his land at \$50 per acre for defendant's store at an agreed valuation, the defendant paying for such land in "merchandise and fixtures," sufficiently shows that plaintiff was to pay in cash the excess of the valuation of the store over the price of the land. p. 191.
11. SAME. — *Consideration.* — *Uncertainty.* — *Sales of Real Estate.* — *"More or Less."* — A contract to sell 120 acres "more or less" at \$50 per acre does not render the price of such land uncertain, since the number of acres is ascertainable. p. 191.
12. DAMAGES. — *Liquidated.* — *Contracts.* — A contract providing that defendant shall exchange his store at a certain valuation for plaintiff's farm at a certain valuation per acre, plaintiff to pay the difference, and providing that in case of breach \$500 should be paid as liquidated damages by the violating party, such sum must be so treated, the actual damage being difficult of computation, and such sum being within the reasonable limits of the probable loss. p. 191.

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13. PLEADING. — *Complaint.* — *Damages.* — *Liquidated.* — *Whether Actual Must Be Alleged.*—Where the contract sued upon provides for liquidated damages, actual damages need not be alleged. p. 191.

From Montgomery Circuit Court; *Jere West*, Judge.

Action by Daniel V. Howard against Guy Adkins. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

Chase Harding, for appellant.

Albert D. Thomas and *Michael E. Foley*, for appellee.

MONKS, J.—This action was brought by appellant to recover liquidated damages for the breach of a contract. A demurrer for want of facts was sustained to each paragraph of the complaint, and a judgment followed that appellant take nothing by his suit, and pay the costs.

The assignment of errors calls in question the action of the court in sustaining said demurrer. It is objected by counsel for appellee that appellant has not complied

1. with rule twenty-two of this court in the preparation of his brief in this: "That it is confused and indefinite, with its several parts so intermingled with irrelevant matters and statements" as not to be understood. While it may be true that appellant has not prepared his brief in all respects as required by the rule mentioned, yet the brief contains enough to advise each of the judges of the questions which are presented for determination. It is manifest that appellant has made a good-faith effort to comply with, and has substantially complied with, our rules in the preparation of his brief. This is sufficient. *Stametz v. Mitchenor* (1906), 165 Ind. 672, 675; *Swing v. Hill* (1905), 165 Ind. 411, 414; *Lowe v. Dallas* (1905), 165 Ind. 392, 394. The following is a copy of the writing sued upon:

“New Ross, Indiana, October 15, 1904.

I hereby submit the following proposition: I will exchange my stock of dry goods, groceries, boots and shoes, fixtures, etc., owned by me and with which I am doing business in the Odd Fellows building at New Ross, Indiana,—said stock to be free from liens of every kind and character, and to be invoiced at first cost price, said price to be obtained from bills for said goods from wholesale houses from which they were bought—for 120 acres of land, more or less, owned by Daniel V. Howard of Dana, Indiana, and located about three miles west of Winamac, Pulaski county, Indiana, in sections seventeen and eighteen, township thirty north, of range two west, said land to be free from liens and encumbrances of every kind and character, except a mortgage of \$2,000, and interest thereon from this date, and possession to be given on or before March 1, 1905, nothing reserved. I am to have all loose lumber, tiling, posts, etc., now on said farm, but am not to have any interest in any of the crops or rent of said farm for the year 1904. I am to pay for said farm \$50 per acre in merchandise and fixtures.

When above mentioned stock of merchandise and fixtures has been invoiced at cost, I am to deduct therefrom the sum of \$246, and the remainder is the amount that I am to receive for said stock.

I am to give possession as soon as stock of merchandise and fixtures has been invoiced and trade closed, which is to be as near October 20 as possible.

Either party to this agreement hereby agrees to forfeit to the other \$500 as liquidated damages if he fails to carry out his part of said agreement.

Guy Adkins & Co.

I hereby accept the foregoing proposition.

Daniel V. Howard.”

Appellee first insists that as the contract is within the statute of frauds, no damages can be recovered for the breach of the same because this 120 acres of land

2. cannot be located from the description given. The rule recognized in this State is that “where the de-

scription given is consistent, but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property." *Tewksbury v. Howard* (1894), 138 Ind. 103, 105, 106, and cases cited. And see, *Colerick v. Hooper* (1852), 3 Ind. 316, 56 Am. Dec. 505; *Torr v. Torr* (1863), 20 Ind. 118, 122, 124, and authorities cited; *Guy v. Barnes* (1867), 29 Ind. 103; Wood, Stat. of Frauds, §353; 20 Cyc. Law and Proc., 270, 271.

It is a well-settled rule that parol evidence is admissible to apply a contract to its subject-matter. *Wills v. Ross* (1881), 77 Ind. 1, 13, 40 Am. Rep. 279, and cases cited.

Contracts governed by the statute of frauds, like other contracts, are to be read "by the light of surrounding circumstances." It follows, therefore, that parol evidence may be given of the situation and relation of the parties and the surrounding circumstances. *Wills v. Ross*, *supra*; *Ransdel v. Moore* (1899), 153 Ind. 393, 400, 401, and authorities cited; *Mace v. Jackson* (1871), 38 Ind. 162, 166, 167; *Colerick v. Hooper*, *supra*; *Torr v. Torr*, *supra*; *Guy v. Barnes*, *supra*; *Tewksbury v. Howard*, *supra*; *Johnson v. Buck* (1872), 35 N. J. L. 338, 10 Am. Rep. 243; *Bacon v. Leslie* (1893), 50 Kan. 494, 31 Pac. 1066, 34 Am. St. 134, 136, 137, and note page 141; *Mead v. Parker* (1874), 115 Mass. 413, 15 Am. Rep. 110; *Hurley v. Brown* (1868), 98 Mass. 545, 96 Am. Dec. 671, and note page 675; *Preble v. Abrahams* (1891), 88 Cal. 245, 26 Pac. 99, 22 Am. St. 301, and note page 306; *Lente v. Clarke* (1886), 22 Fla. 515, 1 South. 149; *Williams v. Morris* (1877), 95 U. S. 444, 456, 24 L. Ed. 360, and cases cited; *Hodges v. Kowing* (1889), 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; *Moayon v. Moayon* (1903), 114 Ky. 855, 72 S. W. 33, 102 Am. St. 303, 60 L. R. A. 415, 423, 424;

Pomeroy, Contracts (2d ed.), §§90, 152, 161, and notes; 1 Beach, Contracts, §581; Clark, Contracts, p. 120; Wood, Stat. of Frauds, §§395, 396, 449, and notes; Browne, Stat. of Frauds (5th ed.), §385; 1 Reed, Stat. of Frauds, §416; Tiffany, Sales, pp. 70, 71, and notes 173, 174, 673, 674; 17 Cyc. Law and Proc., 317, 318.

In 1 Warvelle, Vendors (2d ed.), §135, it is said that a description as "my house and lot" imports a particular house and lot, rendered certain by the description that it is the one that belongs to "me." The following descriptions have been held sufficient: "My lot * * * on the plat in the town of South Bend, on the plat of said town, on the river bank" (*Colerick v. Hooper, supra*); the "Snow farm" (*Hollis v. Burgess* [1887], 37 Kan. 487, 15 Pac. 536); "H.'s place at S." (*Hodges v. Kowing, supra*); the "Knapp house property" (*Goodenow v. Curtis* [1869], 18 Mich. 298); an agreement to convey land described as "occupied" by the vendor or a third person (*Angel v. Simpson* [1887], 85 Ala. 53, 3 South. 758; *Towle v. Carmelo Land, etc., Co.* [1893], 99 Cal. 397, 33 Pac. 1126; *Docter v. Hellberg* [1886], 65 Wis. 415, 27 N. W. 176). In all such cases, parol evidence of the situation of the parties and the surrounding circumstances when the the contract was made was admitted so that the court might be placed in the position of the parties, and thus see with their eyes and understand the force and application of the language used by them. It must be assumed, looking at the terms of the writing, that the parties

5. had in view and understood that they were dealing as to a particular tract of "120 acres of land more or less" owned by appellant and located in the section, township and range mentioned in said writing. Under this view it is evident that the description of the real estate set out in the writing sued upon was, *prima facie*, sufficient.

In a suit on such writing, it was not necessary to the sufficiency of the complaint to allege that appellant had

only one tract answering such description. 20

6. Ency. Pl. and Pr., 450. If appellant had more than one tract of "120 acres of land more or less" in said sections answering said description, whereby the sufficiency of the contract as identifying a particular tract of land would be destroyed, that is a matter of defense to be set up in an answer. *Lente v. Clarke, supra*.

It is urged by appellee that the writing sued upon is indefinite and uncertain, and therefore insufficient under the statute of frauds, because there is no provision

7. for the payment of any possible difference between the value of the farm at the agreed price and the stock of goods to be ascertained by the invoice. In this State it is not necessary that the consideration be stated in writing, but it may be proved by parol. See §6630 Burns 1901, §4905 R. S. 1881; *Hiatt v. Hiatt* (1867), 28 Ind.

53. If the writing undertakes to state the consideration, but states it indefinitely, such ambiguity may be relieved to the same extent that it is competent to explain other ambiguous writings not within the statute of frauds. *Burke v. Mead* (1902), 159 Ind. 252, 258, 259, and authorities cited; *Martindale v. Parsons* (1884), 98 Ind. 174, 178-181. With reference to the elements of certainty generally, it is well settled that what

the law implies in a contract is as much a part of it as what is expressed, and such contract must be read and construed as if the same were written therein. 1 Beach, Contracts, §710; *Burke v. Mead* (1902), 159 Ind. 252, 258, and cases cited; 1 Reed, Stat. of Frauds, §400; *Barry v. Coombe* (1828), 1 Pet. (U. S.) *640, *651, *652, 7 L. Ed. 295; *Ryan v. Hall* (1847), 54 Mass. 520, 523; *Lawler v. Murphy* (1890), 58 Conn. 294, 304-311, 20 Atl. 457, 8 L. R. A. 113.

It is apparent from the writing that the parties thereto understood that the value of the merchandise and fixtures,

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as fixed by the invoice, less \$246, would equal, if

10. not exceed, the sum at which the land was to be taken by the appellee, for it is expressly provided therein that he was to pay for the land in "merchandise and fixtures." It is evident under the authorities cited that the appellant was to pay in cash whatever amount, if any, the cost price of the merchandise and fixtures, less \$246, exceeded the amount which the land was to be taken at. So construed, the writing is not indefinite or uncertain in the respect urged by appellee.

The fact that the land is mentioned in the writing as "120 acres more or less," and the amount to be paid therefor is "\$50 per acre," does not render the price of

11. the land uncertain, as the number of acres could be ascertained and the price determined.

It is next claimed by appellee that the amount named in the writing as liquidated damages is a mere penalty, and as the complaint does not allege facts showing

12. actual damages, the same is insufficient. Under the rule declared in *Bird v. St. Johns Episcopal Church* (1900), 154 Ind. 138, 147, 148, and cases cited, the amount named as liquidated damages must be

13. so treated. Where liquidated damages are provided for, it is not necessary to allege actual damages.

It follows that the objections urged to the complaint are not tenable. Judgment reversed, with an instruction to overrule the demurrer to the complaint.

WURFEL v. THE STATE.

[No. 20,794. Filed October 11, 1906.]

1. **APPEAL AND ERROR.**—*Instructions.*—*Independent Assignments.*
—Error in the giving of instructions cannot be assigned independently on appeal. p. 192.

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171	100

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2. **APPEAL AND ERROR.—Bill of Exceptions.—New Trial.—Motion for.—Whether in Record.**—A motion for a new trial contained only in the bill of exceptions is not a part of the record; and error assigned thereon cannot be considered. p. 192.

From Clark Circuit Court; *C. W. Cook*, Special Judge.

Prosecution by the State of Indiana against Edward Wurfel. From a judgment of conviction defendant appeals. *Affirmed.*

James W. Fortune, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

JORDAN, C. J.—Appellant was charged and convicted by a jury in the lower court with having committed an assault and battery upon Anna Weidner, with the felonious intent to commit rape. Over his motion for a new trial he was sentenced, upon the verdict of the jury, to be imprisoned in the Indiana Reformatory for an indefinite period of from two to fourteen years, and was fined in the sum of \$1.

From this judgment he appeals to this court, and assigns various errors to the effect that the trial court erred in giving certain instructions and also in overruling

1. his motion for a new trial. The several independent assignments of error, based upon the action of the court in giving the instructions in question, are not legitimate and are of no avail, hence the only proper assignment which we have before us is the one calling in question the ruling of the court in denying the motion for a new trial. But we cannot review any of the alleged errors assigned as grounds for a new trial in this motion,

2. because the latter is not properly in the record.

Instead of being copied and inserted in the transcript as a part of the statutory record, which it is, this motion appears and is set out in a bill of exceptions. This procedure is not authorized, and the motion for a new trial therefore cannot be regarded as a part of the record.

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Wurfel v. State (1906), *ante*, 160, and authorities cited; *Thompson v. Thompson* (1901), 156 Ind. 276; *Cooney v. American, etc., Life Ins. Co.* (1903), 161 Ind. 193.

In fact the record in this appeal in respect to its defects is on "all fours" with that of *Wurfel v. State, supra*, and under the ruling in that case the judgment must be affirmed without considering any of the questions discussed by counsel for appellant relative to the merits of the case.

Judgment affirmed.

**TERRE HAUTE & LOGANSPOUT RAILWAY COMPANY
v. INDIANAPOLIS & NORTHWESTERN TRACTION
COMPANY.**

[No. 20,880. Filed October 11, 1906.]

1. **EMINENT DOMAIN.—Interurban Railroads.—Procedure.—Statutes**—Section one of the act of 1903 (Acts 1903, p. 125, §5464a Burns 1905), providing particularly in reference to the crossing of steam railroads by interurban, suburban and street railroads, is supplemental to section five of the act of 1901 (Acts 1901, p. 461, §5468e Burns 1901), providing generally for condemnation proceedings by interurban and other similar railroads; and the two sections are to be construed as if they were parts of one act. p. 195.
2. **SAME.—Awards.—Appeal from.—Exceptions.—Questions Presentable.—Procedure**—Under §5468e Burns 1901, Acts 1901, p. 461, §5, providing for appeals from an award in condemnation proceedings, matters of law and fact may be set up in the exceptions to an award; and on a hearing in the circuit court the case is governed by the rules of procedure in civil cases where applicable. p. 196.
3. **APPEAL AND ERROR.—Interlocutory Orders.—Eminent Domain.—Interurban Railroads. — Railroads. — Crossings.** — Section 5464a Burns 1905, Acts 1903, p. 125, §1, giving a right of appeal from an order fixing the point of crossing of a steam railroad by an interurban railroad "in the same manner and under the same conditions and restrictions as provided by law in civil cases," does not suspend further proceedings in the

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167	508

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169	207
169	212

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court below; and an appeal from such order is governed by §659 Burns 1901, §647 R. S. 1881, providing for appeals to the Supreme Court from interlocutory orders. p. 196.

4. JUDGMENT.—*Final.—What is.—Appeal and Error.*—A final judgment is one that disposes of the case as to all parties and ends the litigation; and, with certain exceptions, only such judgments may be appealed from. p. 197.
5. EMINENT DOMAIN.—*Interurban Railroads.—Awards.—Appeal.—Rights of Parties.*—Neither the filing of an instrument of appropriation nor the payment of an award, where an appeal is taken, gives the condemning company any title to the lands sought to be condemned, but during such appeal such company is a licensee by law, the proceeding remaining *in fieri* until the final disposition on appeal. p. 198.
6. JUDGMENT.—*Interlocutory.—Eminent Domain.—Interurban Railroads.—Place of Crossing.*—An order of the circuit court under §5464a Burns 1905, Acts 1903, p. 125, §1, providing for the crossing of steam railroads by interurban railroads, fixing the location of the crossing, but not finally determining other issues in the case, is interlocutory. p. 198.
7. SAME.—*Final.—Eminent Domain.—Interurban Railroads.—Awards.—Appeal.—Exceptions.*—A judgment of the court on the exceptions to an award and which disposes of all questions presented is a final judgment from which an appeal will lie. p. 199.
8. APPEAL AND ERROR.—*Interlocutory Orders.—Time for Taking Appeal.—Dismissal.*—An appeal, perfected June 21, 1905, from an interlocutory order entered June 25, 1904, is too late and will be dismissed. p. 199.

From Montgomery Circuit Court; *Jere West*, Judge.

Condemnation proceedings by the Indianapolis & Northwestern Traction Company against the Terre Haute & Logansport Railway Company. From an interlocutory order for plaintiff, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Appeal dismissed.*

John G. Williams, *A. D. Thomas* and *M. E. Foley*, for appellant.

Pierre Gray, for appellee.

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GILLET, J.—Appellee, an interurban railroad company, instituted this proceeding against appellant, a steam railroad company, to obtain by condemnation the authority to cross at grade the right of way and tracks of the latter, at a point in Montgomery county. Appellant appeared to the proceeding, and filed objections to the proposed point of crossing. There was a hearing on said objections before the Montgomery Circuit Court, which resulted in an order, entered on June 25, 1904, fixing the point of crossing at the place proposed in appellee's instrument of appropriation. Appellant filed a motion for a new trial, which was overruled, and an exception was reserved. Such proceedings were afterwards had that appraisers were appointed, who returned an award of damages in favor of appellant, and, within the time allowed by law, the latter filed exceptions to the award. The record does not show whether there has been a final judgment on such exceptions. It appears that, after the overruling of its motion for a new trial, appellant prayed an appeal to the Appellate Court, which was in term granted, but no bond was given, and the transcript was not filed and errors assigned in the Appellate Court until June 21, 1905.

It is insisted by counsel for appellee that an appeal from an order fixing the point of crossing is an appeal from an interlocutory order, and that, as an appeal was not perfected by appellant as required by the statute governing appeals from such orders, a dismissal should follow.

The condemnation proceeding in question was had under section one of the act of March 3, 1903 (Acts 1903, p. 125, §5464a Burns 1905). This act, as directly appears

1. from its provisions, is supplementary to the act of March 11, 1901 (Acts 1901, p. 461, §5468a *et seq.* Burns 1901). The evident design of section one of the act of 1903 was to make more particular provision concerning interurban, suburban, and street railroads seeking to cross steam railroads at grade than had existed under section five

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of the act of 1901, which related to the subject of condemnation by interurban and other railroads of like character of lands and rights and interests therein as against proprietors generally. In the main, the framework of the procedure as it now exists is found in the section last mentioned, and there is no doubt that said sections are to be considered as if they were one enactment.

The provision concerning the right of appeal from the award is given by the act of 1901 in substantially the same language as is found in the steam railroad con-

2. demnation statute (§5160 Burns 1901, §3907 R. S. 1881), and this, under well-settled rules of construction, gives the right to set up in the exceptions matters of both law and fact going to the regularity of the appropriation, the effect of the appeal being to lodge the proceeding in the trial court, where it is governed, at least for the most part, by the ordinary rules of procedure in civil actions. *McMahon v. Cincinnati, etc., R. Co.* (1854), 5 Ind. 413; *Swinney v. Ft. Wayne, etc., R. Co.* (1877), 59 Ind. 205; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.* (1889), 116 Ind. 578; *Midland R. Co. v. Smith* (1890), 125 Ind. 509.

Section one of the act of 1903, *supra*, gives to the company whose right of way is sought to be crossed the right to file objections to the point of crossing, within five

3. days after the delivery of the instrument of appropriation, and to have a hearing thereon, and from a decision of the court or judge adverse to its objections it may appeal "in the same manner and under the same conditions and restrictions as provided by law in civil cases." Such an appeal is different from that which is taken by exceptions to the award, and was evidently intended to bring into review before a court of error the law questions arising under the objections to the location. It is very plain that the act contemplates that the effect of such appeal shall not be to suspend the proceeding, and, as the

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order is an intermediate one, we take it that it was the legislative intent that an appeal therefrom should be governed by the provisions of the code concerning appeals from interlocutory orders (§659 Burns 1901, §647 R. S. 1881), unless it can be said that the order is in legal effect a final judgment.

The general rule is that a judgment, to be final, must dispose of the case as to all of the parties, and finally dispose of the subject-matter of the litigation. *Champ v. Ken-*

4. *drick* (1892), 130 Ind. 545; *Home, etc., Power Co. v. Globe Tissue Paper Co.* (1896), 145 Ind. 174; *Keller v. Jordon* (1897), 147 Ind. 113; 2 Ency. Pl. and Pr.; 72. Mr. Black says: "An interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of court.

* * * An order which does not settle and conclude the rights involved in the action, and does not deny to the party the means of further prosecuting or defending the suit, is not so far final as to be a proper subject of appeal." 1 Black, Judgments, §21. In Elliott, App. Proc., §83, it is said: "No order is final in such a sense as to constitute a final judgment unless it disposes of the main case so far as there is power in the trial court to decide upon the questions presented by the issues, no matter how clearly and decisively the order may indicate what the ultimate judgment will be. Until there is an ultimate judgment the case is not finally disposed of inasmuch as the trial court may change its rulings, award a *venire de novo*, grant a new trial, or make some such order, notwithstanding the fact that in other rulings it may have clearly manifested a purpose to carry its rulings into the ultimate ruling or decree." There are cases in which orders have been treated as final for the purpose of an appeal where the effect was to terminate the controversy, although some further order

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essential to its enforcement remained to be made, or where the order disposed of some distinct branch of the suit. Cases like these sometimes present questions as to the character of the judgment which are difficult of solution, but they stand as exceptions to the general rule and need not now concern us, for we are persuaded that it is the general rule which governs this case.

It must be remembered that neither the filing of the instrument of appropriation nor the payment of the award into the clerk's office constitutes, in the event an

5. appeal is taken, an appropriation of the interests sought to be condemned. In such a case no title vests, and the company which is seeking to condemn has only the rights of a licensee under the statute to hold possession and proceed with the construction of the road pending litigation. *Cleveland, etc., R. Co. v. Nowlin* (1904), 163 Ind. 497; *Sowers v. Cincinnati, etc., Railroad* (1904), 162 Ind. 676. The proceeding, after the filing of the exceptions to the award, continues *in fieri* until the disposition of the appeal (*Midland R. Co. v. Smith* [1890], 125 Ind. 509), and, in respect to regularity, is subject to defeat both on the law and on the facts. *McMahon v. Cincinnati, etc., R. Co., supra*; *Swinney v. Ft. Wayne, etc., R. Co., supra*; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., supra*. It may be, since the proceeding is a special statutory one, that there is no right, on exceptions to

6. the award, to re-litigate the question of location (*Morrison v. Indianapolis, etc., R. Co.* [1906], 166 Ind. 511; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., supra*; *Swinney v. Ft. Wayne, etc., R. Co., supra*); but it is sufficient to make the order fixing the point of crossing interlocutory, that the main case is not disposed of, and that there remains to the defendant the right to wage a contention which may overthrow the proceedings on which the order of location is based.

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In such a proceeding there can, in the nature of things, be but one final judgment, using the term in the sense in which it is used in the general statute concerning the

7. right of appeal, and that judgment is the one which disposes of the proceeding as it is pending on exceptions to the award. This was the conclusion reached by the Appellate Court in *Wabash R. Co. v. Cincinnati, etc., Railroad* (1902), 29 Ind. App. 546, wherein an appeal was sought to be prosecuted from an order fixing the point of crossing as between two steam railroads. While the statute

with which we have to deal expressly gives the right

8. of appeal from the order of location, yet this appeal was irregularly taken and must be dismissed, because appellant has failed to comply with the statute which governs the taking of appeals from interlocutory orders. §659 Burns 1901, §647 R. S. 1881; *Natcher v. Natcher* (1899), 153 Ind. 368; Elliott, App. Proc., §109; Ewbank's Manual, §92.

Appeal dismissed.

THE STATE v. DORSEY.

[No. 20,773. Filed October 12, 1906.]

1. **HIGHWAYS.—Gravel Roads.—Construction.—Bids.—Boards of Commissioners.—Statutes.**—Boards of commissioners are authorized to give notice and receive bids for the construction of free gravel roads by §6901 Burns 1901, Acts 1901, p. 449, §3, and not by §5594q1 Burns 1901, Acts 1899, p. 343, §37, providing that certain specifications shall be filed in the auditor's office and that certain notices shall be given before boards of commissioners shall let contracts for the construction of any public undertaking. p. 202.

2. **STATUTES. — Construction. — Reënactment.—Presumptions.**—Where a statute which is given a certain construction by the Supreme Court is substantially reënacted, the presumption is

that such construction was carried into the new statute; and it will be so construed in the absence of words indicating a contrary intent. p. 203.

3. **HIGHWAYS.—Gravel Roads.—Construction.—County Work.—Statutes.**—Under the act of 1877 (Acts 1877 [s. s.], p. 29, §1, §4246 R. S. 1881) it was uniformly held that the boards of commissioners, in the construction of free gravel roads, were engaged in a county business. p. 203.
4. **SAME.—Gravel Roads.—Construction.—County Work.—Statutes.**—Under §5592 Burns 1901, Acts 1899, p. 170, §4, boards of county commissioners, in the construction of free gravel roads, are engaged in a county business. p. 204.
5. **CONSTITUTIONAL LAW.—Statutes.—Titles.—Gravel Roads.—Construction.—Bids.—Affidavits of Non-Collusion.**—The title of the act of 1899 (Acts 1899, p. 170), providing for the "letting of contracts for the building of court-houses, jails, county or township buildings, bridges, and monuments," does not cover a provision in such act requiring contractors for the construction of free gravel roads to file affidavits of non-collusion, since the construction of such roads is not provided for in such title, nor is it a "matter properly connected therewith," as required by article 4, §19, of the Constitution. p. 204.
6. **INDICTMENT AND INFORMATION.—Perjury.—Highways.—Gravel Roads.—Bids.—Affidavits of Non-Collusion.**—An indictment charging that defendant committed perjury under §2093 Burns 1901, §2006 R. S. 1881, providing that a party making a false affidavit in any proceeding where an affidavit is required by law, shall be guilty of perjury, by the filing of his false affidavit of non-collusion with his bid for the construction of a free gravel road, is bad, since no such affidavit is required by law in such a case. p. 204.

From Vigo Circuit Court; *James E. Piety*, Judge.

Prosecution by the State of Indiana against William C. Dorsey. From a judgment for defendant, the State appeals. *Affirmed.*

Charles W. Miller, Attorney-General, *W. C. Geake* and *James A. Cooper*, Prosecuting Attorney, for the State.

Samuel R. Hamill, for appellee.

MONKS, J.—Appellee was charged by indictment with the crime of perjury, in making an affidavit required by

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law, in violation of §2093 Burns 1901, §2006 R. S. 1881. The indictment was in nine counts, each of which, on motion of the appellee, was quashed. Final judgment was rendered in his favor.

The assignment of errors calls in question the action of the court in sustaining the motion to quash as to each count of the indictment.

Each count charged that the alleged perjury was committed by the appellee in making an affidavit of non-collusion, as required by the law of the State, as bidder for the construction of a free gravel road, under the act of 1901 (Acts 1901, p. 449, §§6899-6913 Burns 1901) and the act amending the same (Acts 1903, p. 294), in a proceeding before the Board of Commissioners of the County of Vigo, State of Indiana. It is claimed by the State that the affidavit made by appellee was required by the provisions of sections thirty-seven and forty-two of the act entitled: "An act concerning county business," commonly called the county reform act. Acts 1899, p. 343, §§5594q1, 5594v1 Burns 1901.

Section 5594q1, *supra*, provides that "in all cases in which the board of commissioners are now or may hereafter be authorized by law to contract for the execution of any public undertaking" said board shall, among other things, cause proper plans, models, etc., of the proposed work to be prepared and filed in the office of the auditor of the county, and cause notice to be given inviting sealed proposals for doing such work. If the cost of the work does not exceed \$2,000, such notice shall be published once each week in two newspapers published in the county, but if the cost of such work exceeds \$2,000, such publication shall be for two weeks in such newspapers; and it also provides: "Further publication may also be made when deemed for the public interest."

Section 5594v1, *supra*, provides: "In all cases where any county officer is authorized by this act to receive bids

for any purpose, each bidder shall file with his bid an affidavit that he has not entered into any combination, collusion or agreement with any person relative to the price to be bid by any one at such letting, nor to prevent any person from bidding, nor to induce any one to refrain from bidding, and that his bid is made without reference to any other bid and without any agreement, understanding or combination with any other person in reference to such bidding. The officer or officers receiving such bids for the purpose of such letting, shall reject any collusive bid, if such collusion shall come to his or their notice before the letting. If the same shall come to his or their notice after the letting, and it shall appear that the successful bidder has been guilty of such collusion as is herein required to be denied in such affidavit, such successful bidder shall forfeit his contract and the same shall be relet."

It will be observed that §5594v1, *supra*, only requires the affidavit of non-collusion mentioned therein in cases

"where any county officer is authorized by this act

1. to receive bids for any purpose." There is nothing in §5594q1, *supra*, which authorizes the board of county commissioners to receive bids. That section provides only for the kind of notice that shall be given asking for bids, and as to the filing of plans and specifications, etc., in the auditor's office. Boards of commissioners were authorized to receive bids for the construction of gravel roads under section three of said act of 1901 (§6901, *supra*), and not by section thirty-seven of the county reform act, as claimed by the State. Section 5592 Burns 1901, Acts 1899, p. 170, §4, provides that "no bid for the building or repairing of any court-house, jail, poor asylum, bridge or other county building or work shall be received or entertained by the board of commissioners of any county in this State, unless such bids shall be accompanied by an affidavit" of non-collusion, and a bond for the faithful per-

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formance and execution of said work and the payment of all debts incurred by the contractor in the prosecution of said work.

This section was, with the exception of the affidavit of non-collusion, a substantial reenactment of section one of the act approved March 14, 1877 (Acts 1877 [s. s.], p. 29, §4246 R. S. 1881). The last-named act provided that "no bid for the building or repairing of any court-house, jail, poor asylum, bridge, fence, or other county building or work shall be received or entertained by the board of commissioners of any county of this State, unless such bid shall be accompanied by a good and sufficient bond," etc.

It is a settled rule of statutory construction that when a statute or a part of a statute has been construed by the court of last resort in a state, and the same is sub-

2. stantially reenacted, the legislature adopts such construction unless the contrary is shown by the language of the act. *Board, etc., v. Conner* (1900), 155 Ind. 484, 496, and authorities cited; *Brown v. Miller* (1904), 162 Ind. 684, 686, 687; *National Supply Co. v. Stranahan* (1904), 161 Ind. 602, 608; *Jarvis v. Hitch* (1903), 161 Ind. 217, 219-222; *Desgain v. Wessner* (1903), 161 Ind. 205-207; *Thacker v. Chicago, etc., R. Co.* (1902), 159 Ind. 82, 89, 90, 59 L. R. A. 792, and cases cited.

It was uniformly held by this court before the enactment of said section four of the act of 1899 (§5592 Burns 1901)

that the board of commissioners, in constructing a
3. free gravel road under the laws of this State, was engaged in a county work within the meaning of section one of the act of March 14, 1877, *supra*. *State, ex rel., v. Sullivan* (1881), 74 Ind. 121, 124-126; *Dewey v. State, ex rel.* (1883), 91 Ind. 173, 181; *Faurote v. State, ex rel.* (1887), 110 Ind. 463, 465, 466.

It is evident under the authorities cited that the construction given the act of 1877, *supra*, in *State, ex rel., v. Sulli-*

van, supra, and other cases decided before said section four of the act of 1899 (§5592, *supra*) was passed, was adopted by the legislature in adopting said last-named section.

An examination of the title of said act of 1899 discloses the fact that the safeguards provided by said act, as expressed by said title, apply only to the "letting of

5. contracts for the building of court-houses, jails, county or township buildings, bridges, and monuments."

It is clear that while the construction of free gravel roads by boards of commissioners, under the laws of this State, is a "county work," yet such work is neither the building of a court-house, jail, county or township building, bridge or monument, and does not come within the meaning of any of the kinds of work mentioned in said title, nor is it a "matter properly connected therewith." Any provision, therefore, in said section four of said act requiring an affidavit and bond from a bidder before filing his bid for any other county work than that mentioned in said title, is void under §19, article 4, of the state Constitution. It follows that the part of said section four which requires the affidavit of non-collusion and bond from bidders for the construction of "county work," which, as we have shown, includes the construction of free gravel roads, is void because the subject thereof is not expressed in the title, nor is it a "matter properly connected therewith," as required by said section of the state Constitution. *Mewherter v. Price* (1858), 11 Ind. 199; *Dixon v. Poe* (1902), 159 Ind. 492, 494, 495, 60 L. R. A. 308, 95 Am. St. 309; *Voss v. Waterloo Water Co.* (1904), 163 Ind. 69, 92, 66 L. R. A. 95, 106 Am. St. 201.

It is evident that the affidavit of non-collusion filed by appellee was not required by law, and that the court

6. did not err in sustaining the motion to quash the same.

Judgment affirmed.

LAKE ERIE & WESTERN RAILROAD COMPANY
v. FORD.

[No. 20,875. Filed October 23, 1906.]

1. **PLEADING.**—*Complaint.*—*Negligence.*—*Railroads.*—*Setting Fires.*—*Excuses.*—A complaint alleging generally that defendant railroad company negligently (1) omitted to use a safe spark-arrester; (2) used a spark-arrester with unusually large and dangerous holes therein; (3) operated its locomotive with the trap door down, thereby increasing the draft, and (4) operated its locomotive with a high and unusual pressure of steam, thereby setting fires and causing plaintiff's injuries, is sufficient as against a demurrer without an allegation that the defects in the spark-arrester could not be more explicitly set out because the locomotive was kept in defendant's exclusive possession. p. 208.
2. **SAME.**—*Complaint.*—*Negligence.*—*Railroads.*—*Setting Fires.*—*Defective Spark-Arrester.*—*Plaintiff's Ignorance of.*—*Inferences.*—*Evidence.*—An allegation in the complaint that because defendant has kept the exclusive possession of its engine the plaintiff is unable to set out the defective condition of the spark-arrester, does not cause an inference that plaintiff cannot prove the defective condition thereof, since such condition may be proved by the escape of large and dangerous coals through such arrester. p. 208.
3. **SAME.**—*Complaint.*—*Negligence.*—*Railroads.*—*Defective Spark-Arrester.*—*Notice.*—In an action against a railroad company for negligently setting fires it is not necessary to allege that the defendant had notice of the defects in the spark-arrester causing the fire. p. 208.
4. **SAME.**—*Variance.*—*Answers to Interrogatories.*—The question of a variance between the pleading and proof cannot be raised on the answers to the interrogatories. p. 209.
5. **TRIAL.**—*Instructions.*—*Railroads.*—*Setting Fires.*—*Care Required.*—An instruction, in an action against a railroad company for negligently setting fires, that if the jury found that the premises adjacent to the track were unusually dry and that a strong wind was blowing in the direction of plaintiff's property defendant would be required to use a greater degree of care than usual, is erroneous, ordinary care under the circumstances being the legal standard. p. 209.
6. **WORDS AND PHRASES.**—*"Negligence."*—"Negligence" is a negative word and imports the absence of the degree of care which it was the duty of defendant to use. p. 211.

7. **TRIAL.** — *Instructions.* — *Negligence.* — *Care Required.* — *Railroads.* — *Setting Fires.* — An instruction that if the jury finds that if extraordinary circumstances existed causing a locomotive to set fires more easily than usual greater care than usual should be used, does not mean the same as that the railroad company must use ordinary care under the circumstances, and that extraordinary circumstances might be considered in determining the requirements of such ordinary care; and such instruction is misleading. p. 212.
8. **NEGLIGENCE.** — *Standard of Care.* — *Variance.* — The legal standard of ordinary care under the circumstances does not vary in negligence cases, though the circumstances to which such test is applied varies with each case; and the greater the danger in a particular case, the greater the diligence required by ordinary care. p. 213.
9. **APPEAL AND ERROR.** — *Instructions.* — *Misleading.* — *Reversible Error.* — The giving of a material misleading instruction is reversible error. p. 213.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Lewis Ford against the Lake Erie & Western Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

John B. Cockrum, Shirts & Fertig and *Hawkins & Smith*, for appellant.

Dan Waugh, Kane & Kane and *Nash & Teter*, for appellee.

GILLETT, J.—Complaint by appellee to recover damages for loss of property by fire, by reason of the alleged negligence of appellant. There was a verdict and judgment in favor of appellee. The question of the sufficiency of the complaint on demurrer is raised, but no useful purpose would be subserved by setting out the entire substance of that pleading. The first paragraph charged negligence, as respects the locomotive and its management, as follows: (a) Omitting to use a safe and sufficient spark-arrester; (b) using a spark-arrester with unusually large and dan-

gerous holes therein; (c) operating the locomotive with the trap-door down, thereby increasing the draft; (d) operating the locomotive with a high and unusual pressure of steam. Each and all of said acts and omissions are charged as the cause of the emitting of great and unusual quantities of large and dangerous coals and brands of fire, whereby a fire was set adjacent to the right of way, which spread to the property of appellee and destroyed it. The averments of said paragraph conclude with the allegation of certain matters pleaded by way of excuse, and as the principal objection which is offered to said paragraph is the claim that the pleading of such matters negatives the prior showing of proximate cause in the setting of the initial fire, it seems important to make a more particular statement of said concluding allegations. They are as follows: "That the plaintiff has had no experience with or knowledge of the mechanism or construction of locomotives or spark-arresters, or their management or operation, and has had no opportunity to make an examination or inspection of said locomotive or spark-arrester, as the same has been in the exclusive possession and control of the defendant, Lake Erie & Western Railroad Company, ever since; that all of the facts and information are and were at the time peculiarly within the knowledge of the defendant, Lake Erie & Western Railroad Company, therefore, the plaintiff cannot set out more specifically, than as herein set out, what mechanism or construction could or should have been used, or in what respect the spark-arrester was insufficient or unsafe, or whether said defects consisted in construction, or in not keeping the same in repair, and the plaintiff is also unable, for want of sufficient knowledge, to set out the facts constituting the negligence of the defendant, Lake Erie & Western Railroad Company, more specifically than as herein set out."

In view of the fact that various acts of negligence may be charged in one paragraph, and that, as against a de-

murrer, it is competent, in a very general way, to

1. predicate an averment of negligence upon an act or omission, it seems that it was quite unnecessary, at least in the first instance, to have added the averments in question. We have concluded, however, that they do not have the effect of negating in any essential degree the matter which precedes. They relate to the spark-arrester, and not to the negligent operation of the locomotive, and, so far from negating the prior allegations, the matter in question, aside from the immaterial statement that the plaintiff could not allege whether the defects in the spark-arrester consisted in a defect of construction or a failure to keep in repair, consisted of matter of excuse for a failure to plead more specifically what was already quite sufficiently pleaded as against the assault of a demurrer. The mere facts that plaintiff had never seen the particular spark-arrester, and that all the facts
2. concerning it were peculiarly within the knowledge of the defendant, do not lead to the inference that he could not establish sufficient facts concerning it to warrant a recovery under said paragraph. If he could not do this by the testimony of appellant's servants, it was nevertheless open to him to do so by the method of exclusion, viz., the elimination of every possible cause, aside from those charged, for the emitting of large and dangerous sparks and coals of fire.

Answering a further objection of appellant to said paragraph of complaint, we have to say that as a matter of pleading it was unnecessary to allege facts showing

3. that it had notice or knowledge of the existence of holes in the spark-arrester caused by the bending or springing of the wires. This was covered by the averment of negligence. *Brookville, etc., Turnpike Co. v. Pumphrey* (1877), 59 Ind. 78, 26 Am. Rep. 76; *Ohio, etc., R. Co. v. Collarn* (1881), 73 Ind. 261, 38 Am. Rep. 134;

Turner v. City of Indianapolis (1884), 96 Ind. 51; *Town of Spiceland v. Alier* (1884), 98 Ind. 467; *Cleveland, etc., R. Co. v. Wynant* (1885), 100 Ind. 160; *Pittsburgh, etc., R. Co. v. Kitley* (1889), 118 Ind. 152; *Rodgers v. Baltimore, etc., R. Co.* (1898), 150 Ind. 397; *Indiana, etc., Traction Co. v. Jacobs* (1906), ante, 85, and cases cited. We regard the first paragraph of the complaint as sufficient, and the considerations suggested lead to the conclusion that the objections of appellant's counsel to the second paragraph of the complaint are not well taken.

Appellant was not entitled to judgment in its favor on the answers to interrogatories. It would serve no useful purpose to set them out. They fail to disclose that

4. the setting of the fire was not the proximate cause of the destruction of appellee's property, and, so far as the matter of variance is concerned, in respect to the finding that the fire started in a manure pile, instead of in the adjoining barn, as alleged, we have to say that the question cannot be raised on answers to interrogatories. *Consumers Paper Co. v. Eyer* (1903), 160 Ind. 424; *Hartwell Bros. v. Peck & Co.* (1904), 163 Ind. 357; *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489.

Appellant complains of appellee's instructions five and six, which were given by the court in the order indicated by their numbers. They are as follows: "(5) It

5. is the duty of a railroad to use all reasonable precaution in running and operating its trains, and in providing its engines with proper spark-arresters, so as to prevent injury to the property of others by sparks or fire emitted or thrown therefrom. (6) If you believe from all of the evidence and circumstances in the case that at the time and prior to the destruction of the property of the plaintiff, as alleged in his complaint, there were a number of wooden buildings and structures standing on either side of the defendant's track and in close proximity thereto,

including the barn or stable of said Melissa McFall in the town of Hobbs, and at such time it was, and for some time prior thereto it had been, unusually dry, thereby rendering such wood buildings and structures, including the barn or stable of said Melissa McFall, and also the property of the plaintiff herein, unusually dry, inflammable and easily set on fire by sparks and coals of fire emitted from defendant's engines in passing through said town, and that there was also at the time, and for several hours prior thereto had been, a strong wind blowing continuously across the defendant's track, in the direction of the barn or stable of said Melissa McFall, and the wooden buildings and structures near the defendant's track, including the property of the plaintiff herein, which greatly and unusually increased the danger and risk of setting fire to such buildings by sparks and coals of fire emitted or thrown from its engine in passing through said town, over ordinary times and conditions, and all of which facts and conditions the defendant knew at the time, the defendant, under such circumstances, would be required to use a greater degree of care in operating and running its engines through said town to prevent injury to such buildings or property by sparks or coals of fire emitted or thrown from its engine than it would at ordinary times and under ordinary conditions."

Assuming, without deciding, that it was not error for the court, in its fifth instruction, to use the term "reasonable precaution," instead of the preferable one, "ordinary care," and assuming further, since the care that the company was required to exercise was, so far as the element of law was concerned, to be measured by a fixed standard, which was to be fully complied with (Wharton, Negligence [2d ed.], §46), that it was proper to use the expression "all reasonable precaution," the question arises whether it is not likely that the jury was misled by the charge in the next instruction that in the circumstances therein hypo-

thetically stated "a greater degree of care" was required than in ordinary conditions. The sixth instruction would have been proper, had the court charged, after stating to the jury hypothetically the conditions which existed, leaving it to them to determine whether the danger was increased, that, in the event they so found, it was their duty, in determining whether reasonable or ordinary care had been exercised, to consider the increased danger of fire, yet we cannot say that this was the fair meaning of the words in which said instruction was couched.

There has been much discussion in the books concerning the correctness of the old doctrine as to degrees of negligence. *New York Cent. R. Co. v. Lockwood* (1873), 17 Wall. 357, 21 L. Ed. 627; *Steamboat New World v. King* (1853), 16 How. 469, 14 L. Ed. 1019; *Ohio, etc., R. Co. v. Selby* (1874), 47 Ind. 471, 17 Am. Rep. 719; *Pennsylvania Co. v. Sinclair* (1878), 62 Ind. 301, 30 Am. Rep. 185; Wharton, Negligence (2d ed.), §44; 6 Albany L. J. 313; 2 Ames & Smith, Cases on Torts, 143; 21 Am. and Eng. Ency. Law (2d ed.), 459, and cases cited. While we apprehend that the adverse opinions which have been expressed concerning such doctrine were not intended to be understood as militating against the view that the legal standard of care is not the same in all relations, or to discountenance the practice of charging the jury in terms that indicate the extent of care required, as great, ordinary, or slight (1 Shearman & Redfield, Negligence [5th ed.], §47), yet the point which we wish to enforce now is that in all cases negligence consists simply in a failure to measure up to the legal standard of care. It was said by

Welles, J., in *Grill v. General Iron Screw, etc., Co.*

6. (1866), L. R. 1 C. P. 600, 611: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use."

Here we admittedly have a case in which it was the duty of the company to exercise ordinary care, but what does an instruction mean that informs the jury that in certain circumstances a greater degree of care is required, when it has for a background an instruction, which is applicable to all circumstances, that all reasonable precaution must be used? We think that in such a case the jury would

7. understand that more than ordinary care was required, and it is not improbable that the effect of giving such an instruction, following an instruction like five, would be to lead the jury to infer that the defendant's duty was raised by the circumstances recited to a pitch of intensity that could not reasonably have been attained.

It was said by this court in *Meredith v. Reed* (1866), 26 Ind. 334, 336: "What is ordinary care in some cases, would be carelessness in others. The law regards the circumstances surrounding each case, and the nature of the animal or machinery under control. Greater care is required to be taken of a stallion than of a mare; so in the management of a steam engine, greater care is necessary than in the use of a plow. Yet it is all ordinary care." The legal standard of care required in a particular relationship is always the same, although the amount of care thus required depends upon the particular circumstances. *Cleveland, etc., R. Co. v. Terry* (1858), 8 Ohio St. 570; *Weiser v. Broadway, etc., St. R. Co.* (1895), 6 Ohio Dec. 215. As has been observed by a modern writer: "This standard may vary in fact, but not in law." 2 Jaggard, Torts, p. 819. In an article in 3 Albany L. J. 314, it is said: "The ratio, proportion or correspondence of diligence to circumstances, of care to surroundings, is fixed and identical. And, in determining a question of diligence or negligence in either case [as between two cases previously used by way of illustration], it would be only necessary to apply the same rule to varying circumstances and persons, to demand the same ratio between varying extremes. And it is not too much to assert that all the perplexity and mis-

understanding on the subject of diligence and negligence are due to the habit of confounding the specific acts and circumstances, which must always vary, with the ratio or relation between them, which remains always the same.”

In 13 Am. and Eng. Ency. Law (2d ed.), 416, it is said: “The very statement of the general rule that reasonable care is required to prevent injuries to others from

8. fire, implies that what is reasonable care must depend upon the circumstances of each particular case. It is, however, inaccurate to say, as many of the cases do, that the degree of care varies with the particular circumstances. It is only reasonable care that is required in any case; but the greater the danger, or the more likely the communication of fire and the ignition of the property of others, the more precautions and the closer vigilance reasonable care requires.” As above suggested, cases can be found in which it is stated that the degree of care to be used depends upon the danger, but, as has been observed by this court, it is not every statement of the law as found in an opinion or text-book, however well and accurately put, which can properly be embodied in an instruction. *Garfield v. State* (1881), 74 Ind. 60. The viciousness of the instruction in question lies in its tendency to lead the jury to infer that the legal standard of ordinary care was raised by the circumstances recited, thus making possible the inference that a great but undefined extent of care was required, whereas all that the law exacted was the ordinary care which the situation demanded, or such care as it is to be assumed that an ordinarily prudent man would exercise in the circumstances, were the risk his own.

In this case the acts and omissions which the complaint charged as negligent were various, so that the question of what was ordinary care arose in a number of ways,

9. and we can only conclude, in view of the misleading character of the instruction under consideration, that prejudicial error has intervened.

Judgment reversed, and a new trial ordered.

GRAND RAPIDS & INDIANA RAILWAY COMPANY ET AL. v. RAILROAD COMMISSION OF INDIANA.

[No. 3. Railroad Commission. Filed October 23, 1906.]

1. **APPEAL AND ERROR.—Transfer.—New Questions.—How Presented.**—In a petition to transfer a cause from the Appellate to the Supreme Court on the ground that a new question of law was involved and decided erroneously, the Supreme Court will not search the record to ascertain such new question, but will look only to the decision of the Appellate Court for the facts and the application of the law thereto. p. 216.
2. **SAME.—Transfer.—Railroads.—Interlocking Devices.**—The decision of the Appellate Court that no appeal lies to such court, under the act of 1905 (Acts 1905, p. 83, §6), from an order of the railroad commission in relation to interlocking devices at a railroad crossing as provided by the act of 1897 (Acts 1897, p. 237), is correct. p. 216.
3. **SAME.—Appellate Court.—Constitutional Law.—Transfer.—Railroad Commission.**—No appeal lies to the Supreme Court from any order of the railroad commission. p. 216.
4. **SAME.—Transfer.—Want of Jurisdiction.**—An appeal taken from an order of the railroad commission to the Appellate Court, where no appeal lies to either the Appellate or Supreme Courts, will not be transferred to the Supreme Court. p. 217.

From Railroad Commission of Indiana; *Union B. Hunt*, Chairman, *William J. Wood* and *Charles V. McAdams*, Commissioners.

Petition by the Chicago & Erie Railroad Company against the Grand Rapids & Indiana Railway Company and others. From an order of the Appellate Court (38 Ind. App. 657) dismissing an appeal by defendants, defendants petition for a transfer to the Supreme Court. *Petition denied.*

G. E. Ross and *J. H. Campbell*, for appellants.

C. V. McAdams, for appellee.

MONKS, J.—Appellants have filed a petition to reinstate the above-entitled cause on the docket of the Appellate Court and transfer the same to this Court.

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It appears from the opinion of the first division of the Appellate Court that the Chicago & Erie Railroad Company filed with the railroad commission of this State a petition against the petitioner herein, under the act of 1897 (Acts 1897, p. 237, §§5158a-5158h Burns 1901), to require the construction, maintenance, and operation of an interlocking device at a crossing of said railroads. The railroad commission granted the relief prayed for in said petition, and this petitioner appealed therefrom to the Appellate Court, claiming the right so to appeal under section six of the railroad commission act (Acts 1905, p. 83, §5405f Burns 1905). The Appellate Court dismissed said appeal on the ground that no appeal from the action of the railroad commission was authorized by law in such a proceeding. *Grand Rapids, etc., R. Co. v. Railroad Com., etc.* (1906), 38 Ind. App. 657.

The petition for transfer sets out the assignment of errors in the Appellate Court, showing that the constitutionality of said railroad commission act was presented in said cause, and alleges: "And appellants aver that the order appealed from being in the form of a judgment, rendered by the Railroad Commission of Indiana, assuming to act judicially, and the questions involved being such that the Appellate Court has no jurisdiction to hear and determine said appeal, said court had no right to assume jurisdiction and to dismiss said appeal. And appellants further aver that this appeal involves, in addition to the question of the constitutionality of said law under which the Railroad Commission of Indiana assumed to act, and of the constitutionality of said order of said commission, the right and power of said Appellate Court to hear this appeal, which are new questions of law, and which have been, as appellants aver, erroneously decided by said Division No. 1 of said Appellate Court."

So far as said petition seeks a transfer of said cause on the ground that the Appellate Court in its opinion has

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decided “new questions of law erroneously,” that

1. being a cause for transfer under clause 1, §1337j Burns 1901, Acts 1901, p. 565, §10 (if this case comes within the provisions thereof), we can only look to the opinion of the Appellate Court in the determination of that question. If that opinion contains a correct statement of the law as applied to the facts stated therein, the petition to transfer will be denied, regardless of the questions actually presented for determination by the record. *City of Huntington v. Lusch* (1904), 163 Ind. 266, and cases cited; *Craig v. Bennett* (1901), 158 Ind. 9; *Barnett v. Bryce Furnace Co.* (1901), 157 Ind. 572.

Looking to the opinion of said court dismissing said cause, the only question mentioned or decided therein is that there is no law authorizing an appeal from the

2. action of the railroad commission to the Appellate Court, in a proceeding under the act of 1897 (Acts 1897, pp. 237-239, §§5158a-5158h Burns 1901), to require interlocking devices when “two or more railroads cross each other at grade.” From an examination of the railroad commission act of 1905, *supra*, and the interlocking switch act, *supra*, we have no doubt of the correctness of the decision of said question by the Appellate Court. Whether said cause, if erroneously decided, would be transferable under any subdivision of said §1337j, we need not determine, but see §5405f, *supra*.

So far as said petition seeks an order of this court to reinstate said cause on the docket of the Appellate Court and transfer the same to this court, on the ground

3. that the record in said case presented constitutional questions for decision, which questions said Appellate Court had no power or authority to decide, it is sufficient answer to say that there is no law authorizing an appeal from the action of the railroad commission in any case to this court, nor, as we have already shown, to the Appel-

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late Court in this case. As no appeal to either
 4. court is authorized by law in this case, this court
 has no authority to order a transfer of the same to
 this court.

The petition to transfer is therefore denied.

167	217
107	31
108	332
167	217
169	366

 THE STATE v. RICHCREEK.

[No. 20,701. Filed May 29, 1906. Rehearing denied October 23, 1906.]

1. **BANKS AND BANKING.**—*Regulation of, by State.—Common-Law Right.*—Any person had the right, at common law, to engage in any department of the banking business, but such right may be regulated or restrained by the State. p. 221.
2. **SAME.**—*Regulation. — Police Power.—Constitutional Limitations.*—The banking business is subject to inspection and control by the State under the exercise of the police power, subject only to the limitations of the Constitution. p. 222.
3. **SAME.**—*Regulation. — Legislative Questions.—Constitutional Limitations.*—The question of proper and needful regulations of the banking business is primarily for the legislature, whose action is subject to review by the courts only when in violation of the Constitution. p. 222.
4. **CONSTITUTIONAL LAW.**—*Confiscation of Property.—Eminent Domain.*—Article 1, §21, of the Indiana Constitution, providing that “no man’s property shall be taken by law without just compensation,” applies only to the taking of specific pieces of private property by the exercise of the power of eminent domain. p. 223.
5. **SAME.**—*Confiscation of Property.—Police Power.*—Article 1, §21, of the Indiana Constitution, providing that “no man’s property shall be taken by law without just compensation” does not apply to the exercise of the police power by which the use of property, once lawful, may be restricted or entirely forbidden, thus destroying the value of such property, without compensation and without the fault of the owner. p. 223.
6. **SAME.**—*Special Privileges.—Banks and Banking.*—The act of 1905 (Acts 1905, p. 182), regulating the business of banking by persons, partnerships and unincorporated persons, does not grant special privileges in violation of article 1, §23, of the

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Indiana Constitution, since there appears no manifest intent to discriminate in favor of one class and against another class, such business being open to all on like terms. p. 224.

7. **CONSTITUTIONAL LAW.**—*Banks.*—*Special Privileges.*—*Due Process.*—The banking act of 1905 (Acts 1905, p. 182) requiring that not more than one-third of the capital of unincorporated banks shall be invested in furniture and fixtures, though it may incidentally inflict hardships and loss to some, applies to all persons alike under the same circumstances, and does not deprive any persons of their property without due process of law in violation of the Fourteenth Amendment of the federal Constitution. p. 224.
8. **SAME.**—*Due Process of Law.*—*Police Power.*—The fourteenth amendment of the Constitution of the United States does not apply to the exercise of the police power by the states, though the exercise of such power may inflict injury upon certain citizens more than others, where its exercise is calculated to promote the general health, morals, peace, education, or general welfare. p. 225.
9. **SAME.**—*Due Process of Law.*—*Property.*—*Implied Obligations Concerning.*—The owner of property under our government holds it under the implied obligation that the use of same shall not be injurious to the community. p. 227.
10. **SAME.**—*Banks and Banking.*—*Requiring Cash Capital.*—The banking act of 1905 (Acts 1905, p. 182) requiring the owners of unincorporated banks to invest at least \$10,000 in the business, not more than one-third of which may be invested in the banking outfit, the balance to remain in cash, does not violate article 1, §21, of the Constitution, inhibiting confiscation, or article 1, §23, thereof, inhibiting class legislation, or the fourteenth amendment of the federal Constitution guaranteeing due process of law. p. 228.
11. **STATUTES.**—*Construction.*—*Banks and Banking.*—*Capital.*—The act of 1905 (Acts 1905, p. 182, §3) requiring that the owners of unincorporated banks shall certify to the Auditor of State that their individual net worth is at least double the amount invested as capital in such banks, does not prohibit such owners from using all of their money in the banking business. p. 228.
12. **BANKS AND BANKING.**—*Character of Business.*—*Regulation.*—The banking business being of a quasi-public nature, the character of governmental supervision is largely a matter of legislative discretion. p. 229.
13. **CONSTITUTIONAL LAW.**—*Banks and Banking.*—*Capital Invested.*—*Liability.*—The act of 1905 (Acts 1905, p. 182, §3) re-

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quiring owners of unincorporated banks to certify to the Auditor of State that they are worth at least double the amount of capital paid into such banks does not violate article 1, §21, of the Constitution, inhibiting confiscation, or article 1, §23, thereof, inhibiting class legislation, or the fourteenth amendment of the federal Constitution guaranteeing due process of law. p. 229.

14. **STATUTES.—Validity.—Banks and Banking.—Residence of Owners.**—The act of 1905 (Acts 1905, p. 182, §3) requiring that at least one partner, in a partnership bank, and the owner of an individual bank, shall be residents of the State, is valid. p. 229.
15. **CONSTITUTIONAL LAW.—Arbitrary Power.**—The legislature cannot exercise purely arbitrary power even in the exercise of the police power, but the power exercised cannot be supervised nor declared invalid unless it conflicts with some constitutional guaranty. p. 230.

From Criminal Court of Marion County (34,887); *Fremont Alford*, Judge.

Prosecution by the State of Indiana against Seth M. Richcreek. From a judgment for defendant, the State appeals. *Reversed.*

Charles W. Miller, Attorney-General, *C. C. Hadley*, *W. C. Geake*, *L. G. Rothschild* and *Rowland Evans*, for the State.

D. P. Baldwin, *T. E. Howard* and *W. W. Thornton*, for appellee.

MONTGOMERY, J.—Appellee was charged by affidavit with having transacted a banking business on July 3, 1905, and for two days prior thereto, and with having used the words "bank," "banker," and "banking" in connection with said business without having filed with the Auditor of State a detailed statement under oath as required by the act of March 4, 1905 (Acts 1905, p. 182, §§2994a-2994j Burns 1905), entitled: "An act to regulate the business of banking by individuals, partnerships and unincorporated persons." The affidavit was quashed, upon appellee's motion, for the alleged reason that it did not contain facts sufficient

to constitute a public offense; and from that decision the State appealed.

The first three sections of the statute upon which this prosecution was based, read as follows:

"Section 1. That every partnership, firm or individual transacting a banking business within this State or using the word bank, banker or banking in connection with his or its business shall be subject to the provisions of this act.

"Section 2. That from and after July 1, 1905, it shall be unlawful for any partnership, firm or individual to transact a banking business in this State unless such partnership, firm or individual has property of the cash value of at least \$10,000. Such property shall be in money, bank furniture and fixtures or real estate for the conduct of the business of such bank, all to be set apart and kept good and unimpaired for the security of creditors of any such bank, and provided that the real estate, bank furniture and fixtures shall not constitute more than one-third in amount and value of the entire capital of such bank.

"Section 3. Every partnership, firm or individual now transacting or hereafter desiring to transact a banking business in this State, shall, under oath, file with the Auditor of State, a full, complete detailed statement of First. The name of the bank or proposed bank. Second. A copy of the articles of copartnership and agreement if a copartnership under which the business of the bank is being or is to be conducted, which shall be executed and acknowledged by all the parties interested therein, and at least one of whom shall be at all times a resident of the State of Indiana. If a banking business is being or is to be transacted or carried on by an individual, such individual shall at all times, while in such banking business, be a resident of the State of Indiana and the statement herein required shall so show. Third. The county and city or town in which the bank is to be located and the business carried on. Fourth. The amount of the capital paid into the business,

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and to be kept and maintained at all times in the business. Fifth. A statement that the responsibility and net worth of the individual members of such firm, partnership or individual is equal to an amount at least double the amount of the capital paid into such bank as herein provided. Sixth. If not disclosed in the partnership agreement, then the names of the officers, agents or employes in the active charge of and management of the business of the bank. Every partnership, firm or individual now doing a banking business in this State shall on or before July 1, 1905, file with the Auditor of State a detailed statement as provided herein."

No formal objection to the affidavit has been suggested, but the assault is directed solely against the act upon which it is founded. It is charged that the provision of section two, forbidding more than one-third of the capital of the bank to be invested in real estate, bank furniture and fixtures for the conduct of the business of such bank, and the second and fifth subdivisions of section three of the statute, are invalid and unconstitutional.

The right of banking, in all its departments, at common law belonged to the individual citizen, to be exercised at pleasure. It is conceded by counsel, and it is un-

1. questionably settled, that the sovereign authority of the State may regulate and restrain the exercise of such right. *Bank of Augusta v. Earle* (1839), 13 Pet. *519, *596, 10 L. Ed. 274; *Blaker v. Hood* (1894), 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854; *State, ex rel., v. Woodmansee* (1890), 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420; *Curtis v. Leavitt* (1857), 15 N. Y. 9, 52; *Attorney-General v. Utica Ins. Co.* (1817), 2 Johns. Ch. 371; *People, ex rel., v. Utica Ins. Co.* (1818), 15 Johns. 358, 8 Am. Dec. 243; *People v. Bartow* (1826), 6 Cowan (N. Y.) 290; *Nance v. Hemphill* (1840), 1 Ala. 551; *State v. Williams* (1852), 8 Tex. 255; *State v. Stebbins* (1828), 1

Stew. (Ala.) 299; 1 Morse, Banks and Banking (4th ed.), §13; Zane, Banks and Banking, §§9, 10.

The *quasi*-public nature of the banking business, and the intimate relation which it bears to the fiscal affairs of the people and the revenues of the State, clearly

2. bring it within the domain of the internal police power, and make it a proper subject for legislative control. Bankers invite general deposits primarily for their own profit, and usually obtain a measure of public patronage, and the expediency of guarding the people against imposition, extortion, and fraud, of affording efficient means of detecting irregular practices, and of learning the true financial condition of the bank, and the necessity of preserving the confidence of patrons in its solvency, and of protecting their interests in case of insolvency, justify inspection and control by the State. When the sovereign people of a state, acting through the legislature, find such police regulation necessary to protect public health, safety or morals, to prevent fraud or oppression, or to promote the general welfare, the power to act is supreme, subject only to such limitations as are imposed by the fundamental

law. The question as to what regulations are proper

3. and needful is primarily for legislative decision, yet when the police power is used to regulate a business or occupation which in itself is lawful and useful to the community, the courts, if called upon, must determine finally whether such regulations as may have been prescribed are so far just and reasonable as to be in harmony with constitutional guaranties. *Republic Iron & Steel Co. v. State* (1903), 160 Ind. 379.

Appellee's learned counsel frankly concede that the business of banking, whether conducted by a corporation or by individuals, is a legitimate subject of inspection and regulation by law under the police power; and further, that the provisions of section two of the act under consideration, making it unlawful to transact a banking business under

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this act on a capital of less than \$10,000 in money, bank furniture, fixtures and real estate, all to be set apart and kept good for the security of creditors of the bank, are wise and salutary. They earnestly contend, however, that the proviso, "that the real estate, bank furniture and fixtures shall not constitute more than one-third in amount and value of the entire capital of such bank," contravenes the constitutional guaranty that "no man's property shall be taken by law without just compensation" (Const., Art. 1, §21), since many private bankers already in business have furniture and fixtures and real estate of more than half, and in some cases nearly equal to, the value of the whole banking capital. It is further argued that this clause violates §23, article 1, of the state Constitution, which provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges and immunities which, upon the same terms, shall not equally belong to all citizens," inasmuch as it casts a burden of discriminating inequality upon established bankers having valuable banking houses and equipments; and finally, that it deprives such bankers of their property without due process of law, and abridges their privileges and immunities in contravention of the fourteenth amendment to the Constitution of the United States.

It was held in *City of Aurora v. West* (1857), 9 Ind. 74, 83, that it is only the taking of specific pieces of private property by the exercise of the power of emi-

4. nent domain, without compensation, that is prohibited by §21, article 1, of the state Constitution, and that property might be taken by taxation for public purposes, without any other compensation than the general and common benefits accruing from the expenditure of the fund thereby produced. It is equally clear that this constitutional provision was not intended to serve as a

5. restraint upon the exercise of the police power of the state for the public welfare, by which a par-

ticular use of property once lawful and unobjectionable, may be forbidden, or property be wholly destroyed, without compensation and without the fault of the owner.

The insistence that the act grants special privileges and immunities is equally untenable. It is manifest that in every regulating statute the precise terms prescribed

6. must be to some extent arbitrary, depending upon the exercise of a sound legislative judgment. The constitutional mandate is satisfied if there be no manifest intent to discriminate in favor of a particular class of citizens to the exclusion of others similarly circumstanced, and the provisions of the restrictive act be in fact open alike to all citizens who may bring themselves within its terms. This act neither confers special privileges, nor makes unjust discriminations, but its privileges are open to every citizen upon the same terms. It denies no privilege to any one, and operates alike upon all who may avail themselves of its benefits. *Parks v. State* (1902), 159 Ind. 211, 225, 59 L. R. A. 190; *Barrett v. Millikan* (1901), 156 Ind. 510, 83 Am. St. 220; *Hancock v. Yaden* (1890), 121 Ind. 366, 6 L. R. A. 576, 16 Am. St. 396; *Barbier v. Connolly* (1885), 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *State, ex rel., v. Currens* (1901), 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

The circumstance, that for a time it may inflict hardship, inconvenience and possibly loss to certain individuals, does not amount to a constitutional objection, so

7. long as such burdens or losses are not needlessly and unreasonably imposed, but result as an incident of a general enactment fairly designed to subserve the public welfare. If the mere fact of resulting inconvenience and loss to an established business, admittedly subject to public control, were sufficient to preclude control under the police power, then regulation would be practically impossible, and this most salutary and necessary power of sovereignty be abridged or wholly destroyed. This statute

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grants equal privileges and imposes like restrictions upon all persons under the same circumstances, and does not deprive appellee of due process of law, or deny him equal protection of the law in violation of the fourteenth amendment to the Constitution of the United States. *Wurts v. Hoagland* (1885), 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; *Duncan v. Missouri* (1894), 152 U. S. 377, 382, 14 Sup. Ct. 570, 38 L. Ed. 485; *Eldridge v. Trezevant* (1896), 160 U. S. 452, 469, 16 Sup. Ct. 345, 40 L. Ed. 490; *Lowe v. Kansas* (1896), 163 U. S. 81, 88, 16 Sup. Ct. 1031, 41 L. Ed. 78; *Missouri Pac. R. Co. v. Mackey* (1888), 127 U. S. 205, 209, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Pacific Express Co. v. Seibert* (1892), 142 U. S. 339, 352, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Budd v. New York* (1892), 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *Hayes v. Missouri* (1887), 120 U. S. 68, 71, 72, 7 Sup. Ct. 350, 30 L. Ed. 578; *Barbier v. Connolly, supra*; *Mugler v. Kansas* (1887), 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Powell v. Pennsylvania* (1888), 127 U. S. 678, 8 Sup. Ct. 992, 1252, 32 L. Ed. 253; *Crowley v. Christensen* (1890), 137 U. S. 86, 89, 11 Sup. Ct. 13, 34 L. Ed. 620; *Bowditch v. Boston* (1879), 101 U. S. 18, 25 L. Ed. 980; *Dent v. West Virginia* (1889), 129 U. S. 114, 124, 9 Sup. Ct. 231, 32 L. Ed. 623; *Missouri Pac. R. Co. v. Humes* (1885), 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *Glucose Refining Co. v. City of Chicago* (1905), 138 Fed. 209, 217.

In the case of *Barbier v. Connolly, supra*, Justice Field, speaking for the court, said: "The fourteenth amendment,

in declaring that no state 'shall deprive any person
8. of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like

circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. * * * Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation, which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, it is not within the amendment.”

In the case of *Mugler v. Kansas*, *supra*, Justice Harlan disposed of an objection similar to that advanced by appel-

lee in the following language: "It is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the state, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments. This interpretation of the fourteenth amendment is inadmissible. It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. * * *

The principle, that no person shall be deprived of

9. life, liberty, or property, without due process of law, was embodied in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

The charters of national banks, state banks of discount and deposit, saving banks, and loan and deposit companies,

authorize them to hold permanently only such real

10. estate as may be necessary for the immediate and convenient accommodation of their business. It is not required that this limitation be altogether wise and just to warrant a holding that it is valid, but it is sufficient if it appears that it was designed and is reasonably calculated to subserve some public purpose. Private banks may be fairly expected to accommodate the public by making loans and discounts, and to that end should have some capital in money, in addition to that entrusted to their care by depositors. It would be manifestly unwise to authorize an investment of the entire capital of a bank in real estate, furniture, and fixtures, as inimical to public accommodation; and, it is a matter of current history that depositors have been made the victims of imposition and fraud, through the allurements of pretended bankers whose only capital consisted of gilt signs, plate glass, mahogany furniture and richly embellished safes. We are not judicially advised that the provision limiting the investment of banking capital in the species of tangible property named would unjustly or unreasonably invade individual rights, but, on the contrary, it appears to us that this provision was suitably designed for the public good, and is a prudent regulation for the guidance of solvent bankers, and a proper precaution against fraud and imposition on the part of financial charlatans. It is our conclusion, therefore, that section two of the act does not contravene any of the constitutional guaranties invoked by appellee.

The same constitutional objections are urged against the validity of that provision of section three of the act, which requires the banker to make oath, "that the responsi-

11. bility and net worth of the individual members of such firm, partnership or individual is equal to an amount at least double the amount of capital paid into such bank." It is insisted that this clause prohibits a banker from using all of his capital in his business, and is an in-

stance of arbitrary selection and of illegal discrimination. It is not correct to say that the banker is thereby prohibited from using all his capital in his business, but he is forbidden from treating his entire holdings as capital stock, and in effect required to have and maintain a reserve or surplus fund. In considering this provision it must

12. be borne in mind that the banking business is not wholly private, but *quasi*-public in character, and subject to governmental supervision, and in view of this fact the arguments advanced appear more appropriate for legislative than for judicial consideration. This feature of

the statute is not different in principle from the
13. double liability of stockholders in incorporated banks, and for the reasons already given and upon the authorities cited we are of opinion that it does not violate any of the constitutional principles relied upon by appellee.

It is finally contended that the provision requiring that an individual, or one member of a firm, conducting a banking business under this act must be a resident

14. of Indiana, is invalid. We cannot sustain this objection.

In the case of *Welsh v. State* (1890), 126 Ind. 71, 9 L. R. A. 664, this court, among other things, said: "It is not true, as is sometimes argued, that the citizen derives his right to sell intoxicating liquor from the particular state in which he sells. In selling he is but exercising his common-law right. * * * It is not an unreasonable requirement that a person who desires to avail himself of a license to retail intoxicating liquors shall submit himself to the jurisdiction of the State, by becoming an inhabitant thereof, to the end that he may be readily apprehended and punished for any violation of the law in connection with his business."

The propriety of this provision is readily manifest. A private banker inviting the confidence and patronage of the

public should not only possess suitable capital, but also a good character. The people entrusting their money to his care should be afforded an opportunity of learning something of his character, habits, and mode of life without going beyond state lines for information. A good character will not insure the safety of a business entrusted wholly to employes, but personal supervision is highly requisite. The situs of the bank assets for the purpose of taxation should be definitely fixed, and not left open to dispute by the non-residence of the owner. It is important that the banker should be within the jurisdiction of our courts, civil and criminal, and be answerable personally to the complaints of creditors, and easily apprehended in case of a violation of the laws governing his business. *Welsh v. State, supra*; *Trageser v. Gray* (1890), 73 Md. 250, 20 Atl. 905, 9 L. R. A. 780, 25 Am. St. 587; *McCready v. Virginia* (1876), 94 U. S. 391, 24 L. Ed. 248; *Wagner v. Town of Garrett* (1889), 118 Ind. 114. The provisions of the New York statute upon this subject are much more stringent, but their validity has not been questioned. See New York Banking Law (L. 1882 Ch. 409, §32).

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions

15. upon lawful occupations, but the public interest existing, the means adopted for its protection must be reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The exercise of the police power is subject to the supervision of the courts, but police regulations may not be declared void merely because deemed contrary to natural justice and equity, but only because they violate some constitutional right. The provisions of the statute under consideration do not violate the constitutional guaranties relied upon, but, in our opinion, have substantial relation to the public welfare, and were intended and are reasonably calculated to protect

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the people of the State against fraud and imposition, and are consequently valid.

The court erred in quashing the affidavit. The judgment is reversed, with directions to overrule appellee's motion to quash, and for further proceedings.

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TROMBLEY v. THE STATE.

[No. 20,809. Filed October 24, 1906.]

1. **APPEAL AND ERROR.**—*Bill of Exceptions.*—*Record.*—*Evidence.*—*Sufficiency.*—Where the evidence has not been made a part of the record on appeal, the Supreme Court cannot pass upon the sufficiency thereof. p. 232.
2. **SAME.**—*Briefs.*—A failure by appellant to present the alleged errors in his brief, is a waiver thereof. p. 232.
3. **NEW TRIAL.**—*Misconduct of Juror.*—*Decision of Trial Court Thereon.*—*Appeal and Error.*—The trial court's decision whether a juror gave the prosecuting witness a sign of recognition by a movement of the hand and wink of the eye will not ordinarily be disturbed on appeal. p. 232.
4. **SAME.**—*Misconduct of Jurors.*—*Discovery of, before Verdict.*—*Waiver.*—Where defendant discovered the misconduct of a juror before the jury retired; and he made no complaint thereof until after verdict was rendered, such objection is waived. p. 233.
5. **SAME.**—*Misconduct of Jurors.*—*Prejudicial.*—Whether a juror motioned at defendant with his closed fist or was sporting with the deputy prosecuting attorney was a question of fact for the trial court; and such conduct, sporting with such attorney, though objectionable, is not reversible, where it is shown that such juror voted favorably to defendant for a long time, and yielded only when thoroughly convinced of defendant's guilt, no prejudice to defendant's rights being shown. p. 234.
6. **SAME.**—*Misconduct of Jurors.*—*Presumptions.*—*Evidence.*—*Absence of.*—Where the trial court found against defendant on his allegations of misconduct of jurors, no presumption of injury to defendant's rights arises; and in the absence of the evidence the Supreme Court will not disturb the verdict and judgment below. p. 236.

From Sullivan Circuit Court; *Orion B. Harris*, Judge.

Prosecution by the State of Indiana against Frank Trombley. From a judgment of conviction, defendant appeals. *Affirmed.*

Charles D. Hunt, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

MONTGOMERY, J.—Appellant was convicted of murder in the second degree. A reversal of the judgment is sought on account of alleged error in overruling appellant's

1. motion for a new trial. The grounds of the motion were the giving of certain instructions, the refusal to give others tendered, misconduct on the part of two jurors, and that the verdict is contrary to law and the evidence. The evidence has not been brought before us, and we cannot therefore pass upon its sufficiency to sustain the verdict, and the alleged errors relating to instructions have been waived by a failure in appellant's brief to present them for consideration.
- 2.

It is insisted by counsel for appellant that such misconduct of jurors is shown as requires the granting of a new trial. It is charged in an affidavit by appellant that,

3. at a recess in the trial during the introduction of the State's evidence, the jury left the box, and, while returning, one of the jurors when within a few feet of Tude Ingram gave a sign of recognition to said Ingram by a movement of the hand and head, and a wink of the eye, which said Ingram answered by a smile and a nod; that said acts were seen by appellant, and when said juror and Ingram discovered that they were so observed they appeared embarrassed; that said Ingram was a brother or half-brother of the deceased, and took, and was at the time taking, an active part in the prosecution of appellant; that appellant immediately mentioned to his counsel what he

had seen, but did not understand its importance, and had no opportunity to explain the matter in full until the close of the trial; and that upon his *voir dire* said juror had answered that he was not acquainted with said Ingram and had never seen him prior to said trial. The State filed the counter affidavits of the juror named and of said Ingram, in which they swore that the charge of appellant was absolutely false in substance and in fact, and declared that at the time mentioned they were wholly unacquainted with each other, and specifically denied the acts charged and the making of any sign or gesture at any time by way of recognition or response.

We are unwilling to hold that a public exchange of salutations between a juror and a prosecuting witness during a trial and in the manner described would constitute harmful misconduct, and in this case are not required to decide the question, since we cannot say that the charge is true. This issue was submitted to the trial court wholly upon affidavits, and we are therefore enabled to get a fair view of the proofs upon which his decision was grounded, and are fully satisfied with the conclusion reached by the trial court. Ordinarily this court will not review the decision of a collateral fact of this character upon contradictory evidence. *Shular v. State* (1903), 160 Ind. 300; *Keith v. State* (1901), 157 Ind. 376; *Hinshaw v. State* (1897), 147 Ind. 334; *Epps v. State* (1885), 102 Ind. 539; *Doles v. State* (1884), 97 Ind. 555; *Long v. State* (1884), 95 Ind. 481; *Weaver v. State* (1882), 83 Ind. 289; *DePriest v. State, ex rel.* (1879), 68 Ind. 569; *Beard v. State* (1876), 54 Ind. 413; *Holloway v. State* (1876), 53 Ind. 554; *Romaine v. State* (1855), 7 Ind. 63.

A man on trial for his life ordinarily would be instinctively quick to observe and complain of any manifestation of bias or prejudice against him on the part

4. of the jurors upon whose decision his fate depended. If appellant saw, as he claims, a sus-

picious interchange of signs of recognition between his prosecutor and a juror, who were supposed to be strangers to each other, its significance would doubtless impress him at once. No subsequent occurrence or information is shown to explain, or to magnify in the mind of appellant, the importance of the acts of which he complains. If after verdict he regarded the incident as important, he ought to have so regarded it at the time of its alleged occurrence; and, if he deemed it to be misconduct on the part of the juror, he should have made his complaint known to the court at the earliest opportunity, and arrested the trial. No substantial excuse is given for his failure to speak at once, and having kept silent, and thereby elected to abide the action of the jury, he waived his right to complain of the alleged misconduct. It follows, therefore, that if the acts occurred as charged and were conceded to be harmful, appellant having knowledge long previous, could not complain thereof for the first time after verdict against him. *Blume v. State* (1900), 154 Ind. 343, 356; *Madden v. State* (1897), 148 Ind. 183, 187; *Robb v. State* (1896), 144 Ind. 569; *Grubb v. State* (1889), 117 Ind. 277, 283; *Waterman v. State* (1888), 116 Ind. 51, 53; *Coleman v. State* (1887), 111 Ind. 563; *Henning v. State* (1886), 106 Ind. 386, 55 Am. Rep. 756.

It was charged upon the affidavit of the deputy clerk that, as the jury retired to deliberate upon a verdict, one

of the jurors, looking in the direction of appellant,

5. extended his left arm with his hand closed and made repeated motions with his arm and hand in the manner of shaking his fist, at or toward appellant. The juror thus accused denied that he shook his fist or made any other gesture at appellant, but said that, as the jury were passing out, the deputy prosecutor, A. R. Martin, with whom he was on intimate and friendly terms, in a playful manner kicked him on the leg, and that he then

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turned round and shook his fist at said Martin, and at no other person, and that said motions were made by him in a friendly spirit, and not otherwise, and that they were the same motions and gestures mentioned in the affidavit of the deputy clerk; that at no time did he entertain any ill feeling toward appellant; that in argument appellant's counsel admitted that he was guilty of voluntary manslaughter; and that during the deliberations of the jury, for many ballots affiant voted to convict appellant of manslaughter and of no higher degree of homicide, and concurred in the verdict of murder in the second degree after long deliberation, and only when finally convinced of appellant's guilt of that offense. A. R. Martin, the deputy prosecutor, also made affidavit fully and specifically confirming the statements of the juror in explanation of the gestures complained of by appellant.

These affidavits satisfactorily explain the acts complained of and make it entirely clear that the juror named did not manifest any prejudice or hostility toward appellant, and upon that theory the charge of misconduct is groundless. The sportive mood and conduct of the deputy prosecutor and juror were ill-timed, and did not comport with the gravity of the moment and the importance of the question under consideration; but in the incident nothing is found that can fairly be said to appeal to the prejudice or favor of the juror or to disqualify him from impartially deciding the guilt or innocence of the accused. We are justified in disturbing a verdict of guilty on account of the alleged misconduct of a juror, only when it is shown that such misconduct was prejudicial to the rights of the defendant, or when such a state of facts is shown that it may fairly be presumed therefrom that the defendant's rights were prejudiced. *Drew v. State* (1890), 124 Ind. 9, 12; *Long v. State* (1884), 95 Ind. 481, 486; *Achey v. State* (1878), 64 Ind. 56; *Whelchell v. State* (1864), 23 Ind. 89; *Bersch v. State* (1859), 13 Ind. 434, 74 Am. Dec. 263.

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No presumption of injury to the rights of appellant arises from the facts disclosed, and in the absence of

6. the evidence we are unable to say that the verdict and judgment were not fully justified.

The judgment is affirmed.

INDIANAPOLIS STREET RAILWAY COMPANY v. RAY.

[No. 20,852. Filed October 24, 1906.]

1. **APPEAL AND ERROR.—Initial Attack on Appeal.**—Under §346 Burns 1901, §343 R. S. 1881, a defendant may question the sufficiency of the complaint for the first time on appeal. p. 239.
2. **SAME.—Complaint.—Sufficiency.—Initial Attack on Appeal.**—A complaint, attacked for the first time on appeal, is sufficient unless there is a total absence of some essential allegation, mere uncertainty or inadequacy of averment, such as might have been amended upon motion, being insufficient to render such complaint bad. p. 239.
3. **PLEADING.—Complaint.—Carriers.—Sufficiency of Averments of.—Street Railroads.**—A complaint alleging that defendant is a corporation organized under the laws providing for the formation of street railway companies and that it is the owner and engaged in operating a line from Union Station to Fairview Park, sufficiently shows that defendant is a carrier of passengers. p. 240.
4. **EVIDENCE.—Judicial Notice.—Street Railroads.—Carriers.**—Courts take judicial notice that street railway companies are carriers of passengers. p. 240.
5. **PLEADING.—Complaint.—Street Railroads.—Ownership of Car Causing Injuries.—Averments of.**—An allegation, in an action against a street railroad company for personal injuries, that "one of the cars of defendant's road, running south from Fairview Park to the city of Indianapolis" caused plaintiff's injuries, sufficiently shows that defendant was operating such car, the ownership of such car being an immaterial matter. p. 240.
6. **SAME.—Complaint.—Street Railroads.—Passenger Car.—Averments of.**—A complaint showing that plaintiff sounded the electric bell to be sounded by passengers desiring to get off; that the motorman stopped the car; that said car was a summer car having the seats running transversely; that passengers

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alighted at the side by stepping upon a running-board and thence to the ground, sufficiently shows that the car was a "passenger" car. p. 241.

7. **PLEADING.—Complaint.—Specific Averments.—Necessary Implications.**—Facts necessarily implied from the specific averments of a complaint are sufficiently alleged. p. 241.
8. **SAME.—Complaint.—Street Railroads.—Control of Cars.—Averments of.—Sufficiency of, after Verdict.**—A complaint alleging that plaintiff was, when injured, riding on "one of the cars of defendant's road" sufficiently shows, after verdict, that defendant was operating such car. p. 241.
9. **SAME.—Complaint.—Carriers.—Street Railroads.—Passengers.—Averments of.**—A complaint alleging that plaintiff was a passenger on defendant's car sufficiently shows the relation of passenger and carrier without an allegation that the fare was paid or offered or that plaintiff had a pass, or was on the car by contract, invitation or consent, such matters being proper matters of proof. p. 242.
10. **SAME.—Ownership.—How Alleged.**—An allegation that plaintiff is the owner of the property in question is sufficient without alleging how the ownership was acquired. p. 242.
11. **SAME.—Complaint.—Carriers.—Passengers.—Duty.**—A complaint showing that plaintiff was a passenger on defendant's street railroad shows that defendant was under a legal duty to plaintiff. p. 242.
12. **SAME.—Complaint.—Street Railroads.—Agents.—Liability for Acts of.**—A complaint showing that plaintiff, a passenger, was injured "on one of the cars of the defendant's road" shows a liability on the part of defendant street railroad company, such company being responsible for the negligent acts of its agents. p. 243.
13. **SAME.—Complaint.—Street Railroads.—Agents.—Negligence.—Proximate Cause.**—Allegations, in an action against a street railroad company for damages for personal injuries, that plaintiff rang the bell to stop, that the motorman stopped the car, and that while plaintiff was alighting the motorman negligently started the car, thereby injuring plaintiff, sufficiently shows that the motorman was acting in the scope of his employment and that his negligence was the proximate cause of the injuries. p. 243.
14. **SAME.—Complaint.—Motion to Make Specific.—Waiver.**—Where defendant fails to move to make the complaint more specific, defects in the averments thereof are waived. p. 243.

15. **TRIAL.—Instructions.—Assumption of Facts.**—An instruction that plaintiff is entitled to damages “for being deprived of freedom of action, and social meeting and intercourse with her friends, which you shall believe from the evidence in this cause, she would have enjoyed,” does not assume that plaintiff was deprived of her freedom or friends, the language clearly limiting recovery to the proof. p. 244.
16. **DAMAGES.—Items of.—Separate Actions.—Personal Injuries.**—The items of damage recoverable in personal injury cases are only such as would support a separate action therefor. p. 245.
17. **SAME.—Negligence.—Proximate Results.—Liability.**—Defendant is legally liable only for the proximate results of his negligence. p. 245.
18. **SAME.—Negligence.—Physical Injury.—Mental Anguish.**—Damages are recoverable for mental anguish in negligence cases only when there has been a physical impact and where such anguish flows from such impact or where it has its origin or exciting cause coincident with such impact. p. 245.
19. **SAME.—Speculative.—Negligence.—Remote Results.—Mental Anguish.**—Damages are not recoverable for mental anguish flowing remotely from a physical impact caused by negligence; nor from a reflection or brooding over the plaintiff’s physical condition caused by such negligence, such damages being wholly speculative and conjectural. p. 246.
20. **TRIAL.—Instructions.—Damages.—Physical Injuries.—Mental Anguish.**—An instruction in a personal injury case that plaintiff should recover for medical expenses past and future, loss of earnings past and future and bodily pain and mental suffering past and future, is correct. p. 247.
21. **SAME.—Instructions.—Negligence.—Damages.—Physical Injuries.—Deprivation of Freedom and Social Intercourse.**—An instruction, in an action for personal injuries, that plaintiff is entitled to recover “for being deprived of freedom of action, and social meeting and intercourse with her friends” is reversible error, since, if such damages are recoverable, they are covered by the general instruction on physical injuries and mental anguish, and, unless specially alleged and proved, they will be presumed to flow from reflection or brooding over the injuries received. p. 248.
22. **APPEAL AND ERROR.—Erroneous Instructions.—When Reversible.**—Where an erroneous instruction is not corrected or cured by another instruction, and it is impossible to tell whether it injured defendant, the judgment will be reversed. p. 248.

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From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Elizabeth Ray against the Indianapolis Street Railway Company. From a judgment on a verdict for plaintiff for \$5,000, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed*.

F. Winter and *W. H. Latta*, for appellant.

Smith, Duncan, Hornbrook & Smith, for appellee.

HADLEY, J.—Appellee sues to recover damages for injuries alleged to have been received in alighting from a car in the city of Indianapolis, through the negligence of the defendant in prematurely starting the car. She was not thrown, but claims she received a severe twist or jar, which provoked to activity a dormant nervous disorder. The issue was formed by the general denial. There was a trial by jury, and verdict and judgment for appellee over appellant's motion for a new trial.

(1) Appellant assigns as independent error the insufficiency of the complaint to state a cause of action. If the question arose upon a demurrer to the complaint, we

1. should have a different question from the one before us. In the circuit court the appellant appeared to the action, filed an answer, subpoenaed witnesses, made costs, went to trial, occupied the time of the court, and, after the verdict and judgment had gone against it, now seeks to put all the proceedings to naught by pointing out deficiencies in the complaint. There is no doubt of the right, under §346 Burns 1901, §343 R. S. 1881, to make the assault at this time, but to be successful the assailant must be able to show a

2. total absence from the complaint of some material averment, or the presence of some averment that destroys the plaintiff's right of recovery, "but," says this court, in *City of South Bend v. Turner* (1901), 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. 200, "mere uncertainty

or inadequacy of averment, such as might have been amended and cured upon motion seasonably made, will be deemed to have been waived by a defendant who proceeds with the trial to final judgment without objection, and who brings his complaint for the first time, after the cause of action has been strengthened by the verdict of a jury, and the presumption indulged in favor of the decisions of the trial court upon motions for judgment, and for a new trial." *Lengelsen v. McGregor* (1904), 162 Ind. 258. While the allegations relating to material facts are—some of them at least—vague and uncertain, yet it cannot be said that there is a total absence of allegation of the existence of any one of them.

The first objection to the complaint is that it does not charge that appellant is a carrier of passengers. It is alleged that the defendant is a corporation organized

3. and acting under the laws of Indiana authorizing the formation of street railway companies, and was the owner of and engaged in operating various lines of street railways in the city of Indianapolis, among others, a line running from the Union Station to Fairview Park.

The principal object of the legislature in authorizing, and of corporations in constructing, street railways, is the carriage of passengers. It is so recognized by statute (§5458 Burns 1901, Acts 1897, p. 201, §1), and is a matter of such common knowledge that the courts will take notice that a company organized

4. and operating a street railway under the laws of this State is a carrier of passengers. *Hipes v. Cochran* (1859), 13 Ind. 175; *Fitzpatrick v. Papa* (1883), 89 Ind. 17; *State v. Downs* (1897), 148 Ind. 324, 328; *Ervin v. State, ex rel.* (1898), 150 Ind. 332.

The second objection is that there is no allegation that appellant owned the car. The allegation is that the plaintiff was riding on "one of the cars of the defendant's

5. road, running south from Fairview Park to the city of Indianapolis." The defendant was operating the

particular street railway, and, if the plaintiff was a passenger on "one of the cars of that road," that is, used in the operation of that road, it made no difference whether the car belonged to the defendant or not.

The third objection is that it is not alleged that the car was a "passenger-car, or one used for the carriage of passengers." It is alleged that she desired to leave

6. said car at New York street, and before the car arrived at that street "she sounded the electric bell provided in said car to be sounded by passengers to announce their desire to leave the car at the nearest street crossing; that the motorman in charge of said car stopped it at New York street. Said car was known as an open or summer car, with seats running across the car from side to side. The entrance and exit from the car was by means of stepping onto a board running along the side of the car, known as a running-board, and thence into the car, and from the car onto the running-board and thence onto the ground. It also had handles upon the sides of the car, "for the assistance of passengers entering or departing from the car." Here we have a car provided with electric signals to be sounded by passengers to announce their desire to get off; a car that is known as a summer or open car—one with seats running across the car from side to side, and with a running-board to assist passengers in getting on or off the car. This was a sufficient identification of the car as one used for passengers. That which is necessarily implied

7. from specific averments of the complaint is sufficiently averred.

The fourth objection is that it does not allege that the car was under the control of the defendant. It is alleged that the road at that particular time was being

8. operated by the defendant, and the car upon which she was riding was "one of the cars of defendant's road." This is equivalent to charging that the car was one

of the cars used by the defendant in operating the road, and is sufficient after the verdict.

It is further objected that it is not alleged that the plaintiff paid or offered to pay fare, or that she had a pass, or was on the car by contract, invitation, or consent

9. of the defendant. It is alleged that she was a passenger on the car. This averment required her to prove that she had complied with the conditions that constituted her a passenger. How she became a passenger was evidentiary. Like ownership—it is

10. sufficient to allege ownership without alleging how it was acquired. *Gowdy Gas-Well, etc., Co. v. Patterson* (1902), 29 Ind. App. 261.

It is also objected that it is not shown that the defendant owed the plaintiff a legal duty; nor shown that the negligence of the conductor and motorman was the negligence of the defendant, or for which the defendant was liable; nor shown that the defendant was guilty of any negligent act; nor that the relation of master and servant existed; nor that the motorman and conductor were acting within the scope of their employment; nor that the negligence of the motorman and conductor was the proximate cause of the plaintiff's injuries.

The plaintiff was a passenger, and, being a passenger, the defendant owed her a duty. In addition to averments noted above, it is alleged that the road was being

11. operated by the use of electricity, and the car upon which the plaintiff was a passenger was in charge of a motorman and conductor; "that she sounded the electric bell provided in said car to be sounded by passengers to announce their desire to leave the car at the nearest crossing; that the motorman in charge of said car stopped the car, * * * and the plaintiff grasped the handhold on the side of the car, placed there for the assistance of passengers entering and departing from said car, and stepped down upon the running-board for the purpose of leaving

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said car, and was just in the act of stepping therefrom to the surface of the street, when the conductor in charge of said car carelessly and negligently gave the motorman the signal to go forward, and the motorman carelessly and negligently, immediately, and before the plaintiff could reach the ground, started the car quickly forward" whereby the plaintiff was injured.

A corporation can act only by its agents, and the allegations that a motorman and conductor had charge of "one of the cars of the defendant's road," that is, one of

12. the cars used in operating its road, and upon which the plaintiff was a passenger, sufficiently shows the relation of employer and employes, and, being charged with the management of the car, were performing a duty that devolved upon the employer, and for which the latter stood responsible.

Furthermore, the allegations that the plaintiff rang the bell to announce her wish to alight, and the motorman thereupon stopped the car, and while engaged in

13. the act of getting off, but before she had alighted upon the ground, the motorman negligently, immediately, and before the plaintiff could reach the ground, started the car quickly forward, quite clearly show the negligent act complained of, and that the motorman and conductor were acting within the scope of their employment, and that their negligence was the proximate cause of the plaintiff's injuries. There are even other objections, of less importance, urged to the complaint, but from

14. first to last, including those reviewed, there is not one that could not have been remedied by a motion to make more specific, and they must now be deemed waived. Appellant's first assignment of error cannot be sustained.

(2) An exception was reserved to the giving to the jury of instruction thirteen, requested by appellee, relating to the question of damages, and which directed

the jury that, if they found the plaintiff was entitled to recover, they should award her such an amount as would fairly and reasonably compensate her, and then proceeds: "She is further entitled to a just compensation for all bodily pain and mental suffering, if any, which she has suffered as a result of her injuries from the time she received the same until now, and for such further bodily pain and mental suffering, if any, as you may find from the evidence she may reasonably be expected to endure in the future; and for being deprived of freedom of action, and social meeting and intercourse with her friends, which you shall believe from the evidence in this cause she would have enjoyed, but for the receipt of such injuries, so far as under the evidence in this cause you shall find that she has been in the past and will in the future be deprived of such freedom of action, and such meeting and intercourse with her friends."

Two points are made against this instruction: (1) Because it assumes that appellee has been deprived of freedom of action, and social meeting and intercourse with
15. her friends; (2) because it makes the deprivation of freedom of action, and social intercourse with friends, an element of damages, separate and distinct, and in addition to mental pain and suffering. The instruction does not assume that the plaintiff has been deprived of her freedom, or friends. The language employed very clearly limits recovery to the proof.

The second objection admits of discussion. The phrase complained of is separated from the preceding by a semicolon, and it seems clear from the context that it was intended to give the jury to understand, and that it did understand, that it was proper for them to consider, as a separate element of damages, independent and distinct from mental suffering, the plaintiff's past and future deprivation of the freedom of action, and social intercourse with her friends, and that it was their duty to award her, in addi-

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tion to any sum allowed for mental suffering, whatever amount the evidence showed would reasonably compensate her.

If mental suffering and loss of society are separate and distinct elements of recoverable damages, in such cases,

then a cause of action must be maintainable for

16. each, for it will not do to say that an independent item of damages may be recovered, when sued for with others, but not in a separate action.

It is a rule of universal acceptance that a person

17. is legally liable only for the natural and proximate results of his negligence.

It is also a rule, not universal, but approved by the decided weight of authority, that a recovery for mental suffering, which, in legal parlance, embraces every

18. description of mental injury, can only be had in cases where the negligent act has been the proximate cause of some degree of physical injury; a broad distinction being made between mental suffering that is attributable to the negligent act, and that which flows directly and naturally from, or which has its origin or exciting cause in, and is coincident with, the physical hurt. *Western Union Tel. Co. v. Ferguson* (1900), 157 Ind. 64, 54 L. R. A. 846; *Coy v. Indianapolis Gas Co.* (1897), 146 Ind. 655, 664, 36 L. R. A. 535; *Wabash, etc., R. Co. v. Morgan* (1892), 132 Ind. 430, 438; *Kalen v. Terre Haute, etc., R. Co.* (1897), 18 Ind. App. 202, 63 Am. St. 343; *Chicago City R. Co. v. Taylor* (1897), 170 Ill. 49, 57, 48 N. E. 831; *Ward v. West Jersey, etc., R. Co.* (1900), 65 N. J. L. 383, 47 Atl. 561, and illustrated cases cited; *Wyman v. Leavitt* (1880), 71 Me. 227, 36 Am. Rep. 303; *Johnson v. Wells, Fargo & Co.* (1870), 6 Nev. 224, 3 Am. Rep. 245; *Walker v. Boston, etc., Railroad* (1902), 71 N. H. 271, 51 Atl. 918; *Consolidated Traction Co. v. Lambertson* (1897), 60 N. J. L. 457, 38 Atl. 684; 6 Thompson, Negligence (2d ed.), §§7319, 7320, and notes.

Distress, depression, or injury of any kind to the mind that flows from a secondary or remote result of the physical injury, or as a reflection, as some of the cases put

19. it, or from a subsequent contemplation and brooding of the mind, as others say, is not the subject of actionable damages. Recovery therefor is denied, chiefly, perhaps, for want of some reasonable ground for admeasurement of the damages. Where the plaintiff has suffered a physical hurt the known usual, natural, probable, or frequent consequence, flowing from other like injuries, form some real basis, not always satisfactory, but generally accepted by the courts as a foundation whence the jury may estimate a reasonable compensation. But where the mental injury is not shown to be a natural and direct result of the physical injury, and therefore not a part of it, but a remote consequence, any attempt at compensation can have no surer base than conjecture and speculation. *City of Columbus v. Strassner* (1890), 124 Ind. 482, 489; *Linn v. Duquesne Borough* (1903), 204 Pa. St. 551, 54 Atl. 341, 93 Am. St. 800, and illustrated cases; *Atchison, etc., R. Co. v. Chance* (1896), 57 Kan. 40, 47, 45 Pac. 60; *Bovee v. Town of Danville* (1880), 53 Vt. 183, 190; *Keyes v. Minneapolis, etc., R. Co.* (1886), 36 Minn. 290, 30 N. W. 888; *Beath v. Rapid R. Co.* (1899), 119 Mich. 512, 78 N. W. 537; 6 Thompson, Negligence (2d ed.), §7320.

In the case of *City of Columbus v. Strassner, supra*, an instruction to the jury, that in assessing the plaintiff's damages they might take into consideration "any lack of personal enjoyment occasioned by the injury," was held to be erroneous for want of a substantial basis for adjusting such loss by a monetary standard.

In the case of *Linn v. Duquesne Borough, supra*, the use of the plaintiff's hands had been permanently impaired by the injury. An instruction on the measure of damages allowed the jury to consider, in addition to the physical and mental injury caused by the accident, "the humilia-

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tion and regret that the plaintiff might thereafter feel because of her inability to attend to her household duties and to perform the services she had before performed for her husband." The quoted part of this instruction was held to constitute reversible error.

In the case of *Atchison, etc., R. Co. v. Chance, supra*, it was held to be error in the court to refuse to strike out testimony to the effect that the plaintiff was troubled by the sickness and confinement of his wife, and the fear that he would leave her and the child in a dependent and helpless condition.

In the case of *Bovee v. Town of Danville, supra*, the plaintiff suffered a miscarriage from the accident, and the jury was directed that "any suffering occasioned thereby, or injury to her feelings," etc., should be compensated. The judgment was reversed because of the last clause quoted, the court saying: "In view of the prominence given the fact of miscarriage, the jury might easily understand that the plaintiff's injured feelings, induced by reflecting upon her calamity, and grieving over her disappointed hopes, was a matter proper for their consideration."

In the case of *Keyes v. Minneapolis, etc., R. Co., supra*, it was held that anxiety that others may be injured from the same cause is an improper consideration for the jury.

The case of *Beath v. Rapid R. Co., supra*, holds that the mental strain and anxiety of the plaintiff occasioned by the postponement of her marriage, as an enforced result of her injury, is not a proper subject for damages under a general averment of damages for mental suffering.

That part of the instruction complained of is governed by the same principle that rules the foregoing cases. The jury in the preceding part of the charge had been

20. directed, if they found for the plaintiff, to compensate her for all medical attention, nursing, for moneys expended for medical and surgical appliances, and

for such sums as she may reasonably be expected to expend in the future for such purposes, for all loss of earning capacity, past and future, and "for all bodily pain and mental suffering which she has suffered as a result of her injuries, if any, or you shall find from the evidence she may reasonably be expected to endure in the future." Here the instruction should have stopped for two reasons: (1)

Being deprived of freedom of action, and social intercourse with her friends, if an injury to the plaintiff proper to be considered, it was so because of regrets and sadness, resulting from such loss, unfavorably affecting her peace of mind, and was therefore embraced within the general term, "all mental suffering," and covered by the preceding part of the charge. (2) Unhappiness resulting from impaired freedom of action, and from being deprived of social intercourse with friends, without special plea or proof, cannot be held to have their origin or inception in the physical injury, but will be presumed to have flowed from contemplation, or brooding over the bodily hurt. Such damages rest, not upon the bodily injury, but wholly upon sentiment, and the mental characteristics of the particular plaintiff. They carry us into a field of hopeless uncertainty. If allowed for the two causes specified, then why not for being deprived of the church, the dance, the theater, and the like? And by what rule of observation, experience, or money standard shall the courts be guided in rendering compensation?

It may be that the verdict would have been the same if the objectionable part of charge thirteen had not

22. been given, but we do not know it, and the appeal must therefore be sustained.

Judgment reversed, with an instruction to grant appellant a new trial.

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[No. 20,839. Filed October 25, 1906.]

1. **APPEAL AND ERROR.**—*Several Demurrer.*—*Single Exception.*—*Several Assignments.*—Where a several demurrer was filed and overruled to a complaint in three paragraphs "to which ruling of the court the defendant excepted," such exception relates to each paragraph and properly questions the sufficiency of each. *Whitesell v. Strickler*, post, 602, followed. p. 253.
2. **PLEADING.**—*Complaint.*—*Municipal Corporations.*—*City Engineers.*—*Special Engineers.*—*Defense.*—A complaint showing that defendant city employed the plaintiff as a special civil engineer for one year at a certain compensation is not bad as showing an attempt by the city to employ an engineer to do the duties of the city engineer, as provided by §3476 Burns 1901, providing for the appointment of a city engineer, the facts of such attempt, if available, being a defense to be specially answered. p. 254.
3. **CONTRACTS.**—*Frauds, Statute of.*—*Municipal Corporations.*—*Engineers.*—A contract providing that the plaintiff should serve defendant city as a special civil engineer for one year at a certain compensation, is not within the statute of frauds as provided by §6229 Burns 1901, cl. 5, §4904 R. S. 1881, such provision having no application to contracts which may or may not be performed within one year. p. 254.
4. **SAME.**—*Municipal Corporations.*—*Statutory Procedure.*—*Ordinances.*—*Resolutions.*—*Written.*—In the absence of a special statutory method of doing their work, municipal corporations may contract for the performance thereof the same as individuals; and such contracts may be by ordinance or resolution, oral or in writing. p. 255.
5. **MUNICIPAL CORPORATIONS.**—*Special Civil Engineers.*—*Power to Appoint.*—*Discretion.*—*Review of.*—The power to employ a special civil engineer is discretionary with a city council, an abuse of which discretion being subject to judicial review. p. 256.
6. **PLEADING.**—*Complaint.*—*Municipal Orders.*—*Actions Upon.*—A complaint counting on a city order properly signed by the mayor and attested by the city treasurer states a good cause of action. p. 256.
7. **MUNICIPAL CORPORATIONS.**—*Orders.*—*Execution.*—Under §8504 Burns 1901, §3069 R. S. 1881 the execution of a valid

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city order requires the signatures of the mayor and city clerk, and the failure of either to sign same renders it invalid. p. 257.

8. MUNICIPAL CORPORATIONS.—*Treasurers.—Refusal to Pay.—Orders Not Signed by Mayor.*—It is the duty of a city treasurer to refuse to pay a city order not signed by the mayor or city clerk. p. 258.
9. SAME. — *Civil Engineers. — Employment. — Evidence.—Sufficiency.—Public Officers.*—Where a special committee of the city council was appointed to contract for the services of a civil engineer and they contracted with plaintiff, who was a county surveyor, at a certain compensation, which employment was reported orally to the council; and plaintiff performed the required services, the council paying the salary agreed upon, but not the additional per cent provided, the plaintiff is entitled to recover such additional per cent. p. 258.
10. APPEAL AND ERROR.—*Judgment.—Complaint.—Paragraphs.—One Insufficient.*—A judgment resting upon a complaint in three paragraphs, one of which is insufficient and to which a demurrer was overruled, will be reversed where it does not affirmatively appear that such judgment rests upon the good paragraphs. p. 260.

From Superior Court of Allen County; *Owen N. Heaton*, Judge.

Action by George E. McKean against the City of Decatur. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

Henry Colerick and L. J. Ninde, for appellant.

Shaffer Peterson, John C. Moran and Clark J. Lutz, for appellee.

JORDAN, C. J.—Appellee commenced this action in the Adams Circuit Court to recover against the city of Decatur for services rendered as a special civil engineer. On change of venue the cause was tried in the Superior Court of Allen County.

The complaint is in three paragraphs. The first substantially alleges the following facts: On April 22, 1903, appellee contracted with the common council of the city of Decatur to serve in its employ as a special engineer. It

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was agreed between him and said city, through its common council, that he was to perform services for the city as a special engineer, for a period of one year, on all contract work let by the city, in addition to the work and services usually performed by a city civil engineer. It was further agreed that, as a compensation for his services for said year, he was to receive from and be paid by said city \$40 per month, and in addition to this he was to receive, as a further compensation, one per cent on all work and contracts let by the city when the aggregate of such contracts and work exceeded \$15,000; but if the contracts or work let by the city during said year of his employment did not exceed \$15,000, he was to receive only \$40 per month. It is shown that he entered into the employment of the city under this contract, and during the year for which he was employed he prepared and furnished for the use of the city all plans and specifications, and did all of its work of civil engineering; that the work let by said city during said year in the way of street improvements and upon which he performed the services of civil engineer was in the aggregate \$57,959.53, from which, after deducting \$15,000, there remained \$42,959.53, upon which he was entitled under his contract to receive and be paid by the city one per cent on said sum, amounting to \$429.59. This sum is now due and wholly unpaid to him. Wherefore he demands judgment, etc.

The second paragraph alleges the same facts as those averred in the first, but in addition thereto it is shown that on May 3, 1904, appellee made out an itemized bill and account for the amount due and owing to him by the city, which bill was fully verified by him before the clerk of appellant city, and was filed in the office of said official; that on May 17, 1904, this bill was presented to the common council of said city at its regular session, and said body, after considering the same, allowed said claim in favor of appellee, and thereupon the clerk of the city drew

and signed an order or warrant for the amount of said claim so allowed, payable to appellee; that he receipted for said warrant and presented it to the mayor of said city for his signature; that the mayor, however, refused to sign it, and appellee then presented the warrant to the treasurer of appellant city, who refused to pay the same, for the reason that it had not been signed by the mayor; that said claim is still due and unpaid. Wherefore judgment is demanded for \$500 and all proper relief.

The third paragraph is founded on what purports to be an order or warrant of the city of Decatur in favor of appellee for \$429.59, which amount had been duly allowed by its common council on May 17, 1904, on account of services which appellee had rendered for the city as a special civil engineer. It is further alleged that the clerk of said city on May 18, 1904, issued to appellee a warrant or order for said sum so allowed by the common council. It is averred that a copy of said warrant, marked exhibit A, is filed with and made a part of the paragraph in question. It is further alleged that after appellee received said warrant he presented the same to the treasurer of the city and demanded payment thereof; that the treasurer refused to pay said warrant, and that said sum of \$429.59, together with the interest thereon, is due and wholly unpaid. Wherefore judgment is demanded, etc. A copy of said order is as follows:

“No. 5,795. General Fund. \$429.59.

Office of City Clerk,
Decatur, Indiana, May 18, 1904.

To the Treasurer of the city of Decatur:

Pay to George E. McKean or order \$429.59. Date of allowance 5-17-1904. Services as City Civil Engineer.

Attest: D. M. Hower, City Clerk.

_____, Mayor.”

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Appellant demurred separately and severally to the first, second, and third paragraphs of the complaint on the ground that neither of said paragraphs states facts sufficient to constitute a cause of action against the defendant. The record recites that this demurrer was "overruled as to each paragraph of the complaint, to which ruling of the court the defendant excepted."

Appellant filed an answer in six paragraphs, to which no demurrer appears to have been filed, and no question is raised in respect thereto. Upon the issues joined there was a trial by the court and a general finding in favor of appellee to the effect that the general allegations of his complaint were true, and that he was entitled to recover the sum of \$429.59. There was a motion for a new trial, assigning, among other reasons therefor, the statutory grounds. This motion, over appellant's exception, was denied, and a judgment in favor of appellee was rendered upon the finding.

The errors discussed and relied upon for a reversal of the cause relate to the overruling of the demurrer to each paragraph of the complaint and to the insufficiency

1. of the evidence to support the finding of the trial court. Counsel for appellee, however, contend that the alleged errors arising out of the ruling on the demurrer to each paragraph of the complaint present no question for review, for the reason that the exception reserved by appellant is *en gros*. In support of this contention they cite *Southern Ind. R. Co. v. Harrell* (1904), 161 Ind. 689, 63 L. R. A. 460. It may be said, however, that this case, and also *Noonan v. Bell* (1902), 159 Ind. 329, on the point in question, were expressly disapproved in *Whitesell v. Strickler* (1907), *post*, 602.

It will be noted that the demurrer in the case at bar was addressed separately and severally to the first, second, and third paragraphs of the complaint, on the ground that not one stated facts sufficient, etc., which demurrer, as the

record recites, was by the court overruled as to each paragraph of the complaint, to which ruling of the court the defendant excepts. Under the circumstances, the exception manifestly was reserved and applied separately to each of the paragraphs designated in the demurrer, and is therefore sufficient. *Whitesell v. Strickler, supra.*

Appellant's counsel assail the first paragraph of the complaint, first, on the ground that under the facts therein alleged it is shown that the employment of appellee

2. by appellant's common council was an attempt on the part of said council to provide for the performance of the regular duties of a city civil engineer, contrary to the general provisions of §3476 Burns 1901, Acts 1901, p. 114, which constitutes a part of the governing law under which appellant city was organized and is operating. This section provides that "the officers of such city shall consist of a mayor, * * * civil engineer," etc. The facts, however, as alleged in the first paragraph of the complaint, do not even tend to support counsels' first contention. If, as counsel seemingly insist, appellant, at the time it employed appellee to serve as a special engineer, had a regularly appointed and acting civil engineer appointed under this statute, then such facts, if available, should have been set up by way of answer, for it is evident that no facts tending to sustain counsels' contention are exhibited by the paragraph in question. In fact, it may be said that there is an entire absence in the complaint of anything going to show that the employment of appellee by the common council was an attempt upon the part of that body unlawfully to interfere with the duties conferred by law on appellant's civil engineer.

Appellant's counsel advance as a second proposition that the first paragraph is also bad because, by the facts therein averred, it affirmatively appears that the contract

3. or agreement under which appellee was employed by the city was not in writing, and was not to be

performed within one year from the making thereof, and, therefore, it is argued that the case falls within the fifth subdivision of §6629 Burns 1901, §4904 R. S. 1881, the same being a part of our statute of frauds. But counsel are mistaken in their contention that the facts alleged show that the contract by which appellee was employed to do the work in controversy was one which, under the agreement of the parties thereto, was not to be performed within one year after the making thereof. On the contrary, it is disclosed that appellee was employed to serve appellant for one year only. This provision of our statute of frauds has no application to contracts which may or may not be performed within one year. *Piper v. Fosher* (1890), 121 Ind. 407; *Durham v. Hiatt* (1891), 127 Ind. 514; *Hinkle v. Fisher* (1885), 104 Ind. 84. It manifestly follows that neither of the above objections urged by counsel to the first paragraph of the complaint is sustained.

It is further insisted, however, that this paragraph is also insufficient because, (1) it does not appear from the facts therein alleged that the common council ever ordered, authorized, or ratified the payment to appellee of any per cent; (2) that the council could not enter into a contract in regard to the payment of the salary or wages of a public officer so uncertain as a percentage of the amount of improvements made by the city during the year.

The first and second paragraphs of the complaint, however, do not proceed upon the theory that appellee was appellant's regular civil engineer, whose appoint-

4. ment or election is provided for by the governing statute under which appellant was organized, and whose annual salary is authorized to be fixed by §3540 Burns 1901, §3105 R. S. 1881. For aught appearing to the contrary, appellant city at the time may have had no regular civil engineer, and may have employed appellee, not to perform all and singular the duties conferred by law

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upon such an officer, but only as an employe to serve it in special business matters where the skill of a civil engineer was required. It may be said that in regard to all contracts which fall within the ordinary corporate powers of a city organized under the laws of this State, and in respect to which no statutory requirements or mode of procedure are provided, the city will be bound by its contracts, whether the same relate to the employment of persons, or to transactions of other business matters pertaining to the city's affairs, and in the making of such contracts the procedure of the common council need not be by resolution or ordinance, and, in the absence of any statute requiring the same, it is not essential to the enforcement thereof that such a contract be in writing. This is a well-settled proposition. *City of Logansport v. Dykeman* (1888), 116 Ind. 15, and authorities cited; *Wilt v. Town of Redkey* (1902), 29 Ind. App. 199, and cases cited; *Town of Gosport v. Pritchard* (1901), 156 Ind. 400; *Cullen v. Town of Carthage* (1885), 103 Ind. 196, 53 Am. Rep. 504.

In fact, the principle asserted in these cases appears to rule the question in regard to the employment of appellee, at least so far as it arises on demurrer. Ordinarily

5. the question in regard to his employment by appellant's common council to do the work which he alleges he performed was a matter which, under the law, rested in the sound discretion of said council, an abuse of which would be subject, however, to a judicial review. We conclude that the first and second paragraphs of the complaint are sufficient on demurrer.

As previously stated, the third paragraph is based upon what purports to be a warrant or order drawn by appellant upon its treasurer for \$429.59, payable to appellee

6. or order. This warrant, under the word "attest," bears the signature of the city clerk, but does not contain the signature of the mayor, the name of that official

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being left in blank. Counsel for appellant assail the sufficiency of this paragraph as a cause of action upon the warrant which was filed therewith and made a part thereof, for the reason that the warrant has not been signed by the mayor, as required by the statute. In support of the sufficiency of this paragraph counsel for appellee rely upon the holding of this court in *City of Connersville v. Connersville Hydraulic Co.* (1882), 86 Ind. 184. It is true that in that appeal this court held that a city organized under the general laws of this State may be sued upon a warrant drawn upon its treasurer by the proper officers. It was held, and properly so, that such a warrant or order is evidence of the city's indebtedness, upon which the holder thereof may maintain an action; but the one involved in that case was signed by the mayor of the city, and was countersigned or attested by the city clerk. Judge Elliott, in passing upon the question relative to the sufficiency of the warrant to constitute a right of action against the city, quoted with approval from 1 Dillon, Mun. Corp. (4th ed.), §502, as follows: "County and city orders signed by the proper officers are *prima facie* binding and legal. These officers will be presumed to have done their duty. Such orders make a *prima facie* cause of action. Impeachment must come from the defendant." To the same effect is the decision of this court in *Board, etc., v. Day* (1862), 19 Ind. 450.

Section 3504 Burns 1901, Acts 1867, p. 33, §22, which is a part of the general governing statute relative to cities, provides that "the clerk shall draw all orders upon

7. the treasury of such city, which shall be signed by the mayor and countersigned by him; but no order shall be drawn upon the treasury except upon an allowance made by the common council, or when the same is fixed by law or the ordinances of such city." This statute requires the clerk of the city to countersign all warrants

drawn by him for the purpose of attesting the authenticity of the mayor's signature. But the signature of the clerk alone to the warrant, in the absence of that of the mayor, is not sufficient to make it a legal demand against the city or its treasurer.

In addition to other legal requirements to render such warrants valid and binding upon the city, they must be signed by the officers prescribed by the statute, and

8. in the absence of the signatures of these officials it becomes the duty of the city treasurer to refuse the payment thereof. 1 Abbott, Mun. Corp., §§226, 231. For the reason that the warrant upon which the third paragraph is founded was not signed by the mayor of the city, as required by the statute, it must be held invalid, and constitutes no legal demand or obligation against appellant, and the trial court, therefore, erred in overruling the demurrer to this paragraph of the complaint.

While there is some conflict in the evidence, nevertheless it may be said to establish the following facts: Appellant city is incorporated under the general laws of this

9. State and has a population of four thousand and over. In March, 1903, its regularly appointed and qualified civil engineer died. In the month of April following, the city being without a civil engineer, the common council, having in contemplation the making of many public improvements during the ensuing year, deemed it necessary to employ a competent civil engineer to make the grades, levels, etc., for such improvements. Accordingly the council, at a regular session held about April 22, 1903, on motion ordered that the mayor of the city appoint a committee of three of the members of the common council to employ a special engineer to make the grades and levels for the general improvements to be made by the city. This committee was appointed by the mayor, and at a subsequent meeting of the council it reported to that body that

it had secured from George E. McKean, a resident of said city of Decatur, "a promise to make surveys, plans, and specifications for all city improvements to be made by said common council, and to do all said work under special employment by the common council." The committee then recommended in its report that the council employ appellee to do and perform all the engineering for the public works then under construction, and thereafter to be constructed, under said council, and further requested that said committee be instructed to enter into a contract and employ appellee. This report appears to have been received and approved by the council. The committee accordingly employed appellee, and the compensation to be paid to him for his services, as finally fixed and agreed upon between him and said committee, was to be \$40 per month, provided the improvements made by the city did not exceed in amount during the year \$15,000. On all amounts of improvements made in excess of \$15,000 he was to receive, in addition to the \$40 per month, one per cent.

There is a conflict in the evidence as to whether the committee reported to the council in regard to the compensation which it had agreed to pay appellee for his services as special engineer. There is, however, evidence to show that the committee made a verbal report to the council as to the compensation which it had agreed to pay appellee for his services, but no record appears to have been made of this report. Appellee, without taking any oath of office or giving any bond, entered into the employ of the city and served it for a period of one year, performing all the work which he was directed to do by the city. He was allowed by the council and paid each month \$40, and at the end of the year for which he was employed his services were terminated by the common council.

The improvements made by the city for which he did the surveying, etc., were all completed according to the plans

and specifications which he made, and it appears that his work was performed to the full satisfaction of the common council.

At the time of his employment he was the regularly elected and qualified surveyor of Adams county, in which appellant city is situated. During the year of his employment the city made improvements to the value and amount of \$57,959.53, upon which he performed the work of a civil engineer. After deducting \$15,000 from the amount, there remained \$42,959.53, upon which, under the contract of his employment, he was entitled to one per cent, such percentage being \$429.59, the amount for which the judgment was rendered. Upon the termination of his services he presented to the common council of the city a claim for said amount, which claim, after being duly considered by that body, was allowed, and the clerk drew and signed a warrant thereon upon the city treasurer. This warrant, as the evidence shows, the mayor refused to sign, and the treasurer accordingly refused to pay. This warrant was introduced in evidence by appellee, and is the same warrant upon which the third paragraph of the complaint is founded.

We find sufficient evidence to support the finding either on the first or second paragraphs of the complaint. The

finding of the court, as previously stated, is gen-

10. eral, and there is nothing in the record proper to show that the judgment does not rest upon the third paragraph of the complaint, which we hold insufficient on demurrer. We cannot resort to conflicting evidence, and explore the same in an attempt to discover whether the ruling of the court on the demurrer to the paragraph in question was harmless to appellant. This rule is firmly settled by a long line of decisions of this court. *Pennsylvania Co. v. Poor* (1885), 103 Ind. 553, and cases cited; *Ryan v. Hurley* (1889), 119 Ind. 115, and cases cited; *Baltimore, etc., R. Co. v. Jones* (1902), 158 Ind. 87, and

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cases cited; *Lake Erie, etc., R. Co. v. McFall* (1905), 165 Ind. 574, and cases cited; Elliott, App. Proc., §638.

For the error of the court in overruling the demurrer to the third paragraph of the complaint the judgment is reversed, with instructions to the lower court to sustain the demurrer to this paragraph, and for further proceedings not inconsistent with this opinion.

**GRAND TRUNK WESTERN RAILWAY COMPANY v.
RAILROAD COMMISSION OF INDIANA ET AL.**

[No. 20,769. Filed October 25, 1906.]

1. **APPEAL AND ERROR.—Railroads.—Interlocking Devices.—Statutes.**—An appeal from a decision in a suit to revise and review the action of the railroad commission, brought under the act of 1905 (Acts 1905, p. 83, §6, §5405f Burns 1905), if such a suit can be maintained, lies to the Appellate Court and not to the Supreme Court. p. 262.
2. **SAME.—Transfer.—Jurisdiction.**—Where an appeal is taken to the Supreme Court and jurisdiction is in the Appellate Court, such appeal will be transferred to the Appellate Court. p. 262.

From Lake Circuit Court; *W. C. McMahan*, Judge.

Suit by the Grand Trunk Western Railway Company against the Railroad Commission of Indiana, and others. From a decree for defendants, plaintiff appeals. *Transferred to Appellate Court.*

Anderson, Parker & Crabill, for appellant.

E. C. Field, J. B. Peterson, H. R. Kurrie and *C. V. McAdams*, for appellees.

MONKS, J.—The Chicago, Indianapolis & Louisville Railway Company, known as the "Monon," filed with the railroad commission of this State a petition against appellant and another railroad company under the act of 1897 (Acts 1897, p. 237, §§5158a-5158h Burns 1901), to compel the construction, operation, and maintenance of an in-

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terlocking device at points in Lake county, Indiana, where said railroads cross the track of the Monon. The railroad commission granted the prayer of said petition and apportioned among the parties the cost of installing, maintaining, and operating said interlocking switch.

This suit was brought by appellant in the court below to review and revise said action of the railroad commission, and purports to be brought under the provisions of

1. section six of the railroad commission act (Acts 1905, p. 83, §5405f Burns 1905). Final judgment on demurrer to the amended complaint was rendered against appellant. Said section six expressly provides that appeals from judgments of the circuit or superior courts, rendered in proceedings under said section six, shall be to the Appellate Court. In ordering this transfer, we do not decide that an action can or cannot be brought under said section six to review and revise the action of the railroad commission in proceedings under the interlocking switch act (Acts 1897, *supra*), as that is a question for
2. the determination of the Appellate Court. This appeal is therefore transferred to the Appellate Court.

WABASH RIVER TRACTION COMPANY v. BAKER.

[No. 20,788. Filed June 7, 1906. Rehearing denied October 25, 1906.]

1. **CARRIERS.—Street Railroads.—Passengers Alighting from Moving Train.—Contributory Negligence.**—The question of the contributory negligence of a woman who, on account of the crowded condition of a street car, sat on an improvised seat in the rear doorway and who stepped on the lower step as the car was coming to a stop and was thrown therefrom by a sudden start, is for the jury. p. 264.
2. **TRIAL.—Instructions.—Street Railroads.—Care Required.**—An instruction, in an action by a passenger against a street railroad company for damages for personal injuries, that a

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higher degree of care is imposed upon street railroad companies than steam railroad companies, is erroneous. *Anderson v. Citizens St. R. Co.*, 12 Ind. App. 194, disapproved. p. 265.

3. **TRIAL.—Instructions.—Carriers.—Street Railroads.—Care Required.**—An instruction that it is the duty of a street railroad company to carry its passengers to their destination and set them down as safely as the conveyance employed and the circumstances of the case will permit, is correct. p. 266.
4. **SAME.—Instructions.—Carriers.—Street Railroads.—Care Required.**—An instruction that street railroad companies are bound to use greater care toward passengers than steam railroad companies is not misleading, where the jury is further instructed that street railroad companies are not insurers of the safety of their passengers and are liable only when they fail to exercise the highest degree of care to secure their passengers' safety. p. 266.
5. **SAME.—Instructions.—Carriers.—Street Railroads.—Alighting from Moving Car.—Contributory Negligence.—Question for Jury.**—An instruction that plaintiff's attempt to alight from a moving car is not conclusive of contributory negligence, but that such question is for the jury, is correct. p. 266.

From Huntington Circuit Court; *James C. Branyan*, Judge.

Action by Ethel Baker against the Wabash River Traction Company and another. From a judgment on a verdict for plaintiff for \$800, defendant company appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed*.

Sayre & Hunter and *Barrett & Morris*, for appellant.
Shively & Switzer and *S. E. Cook*, for appellee.

MONTGOMERY, J.—Appellee recovered a judgment for a personal injury sustained while being carried as a passenger by appellant. The only assigned error relied upon is the overruling of appellant's motion for a new trial. The grounds of the motion urged upon us are insufficiency of evidence to sustain the verdict and error of law in giving to the jury instructions two and four at the request of appellee.

Appellee was returning to the city of Wabash from Boyd park, and it was near midnight when she was hurt. The

car was crowded, the seats were full, some of the
1. passengers sitting in the laps of others, the aisles and vestibules were filled, and some boys were on the top of the car. Appellee was required to stand, until, becoming tired, she removed her jacket and, placing it upon the step leading from the rear vestibule into the car proper, sat down upon it. She had notified the conductor that she desired to get off at "South Side," a customary stopping place in the city of Wabash. As the car approached her destination its speed was slackened until it did not exceed one mile per hour, whereupon appellee descended to the lower step ready to alight when the car should come to a full stop. The power was suddenly applied, causing the car to lurch forward, throwing the standing passengers off their balance, and bunching them together, and throwing appellee against the vestibule door and out upon the ground with great violence.

Appellant's counsel argue from these facts that appellee voluntarily left a place of safety, and took a perilous position upon the car, and that she is guilty of contributory negligence as a matter of law. If appellee had been furnished a customary seat within the car, this argument would impress us more favorably, but it can hardly be conceded that she was in a place safe against such perils as produced her injury, as long as she was required to stand or to occupy an improvised seat in the doorway where she was liable to be trampled by the standing passengers of the crowded car. The lateness of the hour and the unusual number on board would naturally suggest the desirability of dispatch in the discharge of passengers, and the slow speed at which the car was running would ordinarily induce a person already standing to believe that it was safe to move toward the place of exit, and we cannot say that under the circumstances shown appellee was guilty of negli-

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gence in moving down to the lower step of the car, but affirm that the question of her negligence was rightly submitted to the jury for determination. *Indianapolis St. R. Co. v. Hockett* (1903), 159 Ind. 677; *Citizens St. R. Co. v. Merl* (1901), 26 Ind. App. 284; *Anderson v. Citizens St. R. Co.* (1895), 12 Ind. App. 194; *Citizens St. R. Co. v. Spahr* (1893), 7 Ind. App. 23; *Chicago City R. Co. v. McCaughna* (1905), 216 Ill. 202, 74 N. E. 819; *Alton, etc., Traction Co. v. Oliver* (1905), 217 Ill. 15, 75 N. E. 419.

Complaint is made of the giving of instruction two, which reads as follows: "The court charges you that there is a higher degree of care imposed upon street rail-

2. ways than upon ordinary steam railways, and if you should find in this case, by the evidence, that the plaintiff was a passenger on one of defendant's cars on the night in question, returning from Boyd park, bound for her home in Wabash, and in giving her ticket to the conductor notified him that she wished to get off at a regular stopping place in said city, known as South Side, it was the duty of the defendant to carry the plaintiff safely to said stopping place, and its duty toward the plaintiff as a carrier of passengers was not discharged or ended until it had conveyed her to the point designated, and set her down as safely as the means of conveyance employed and the circumstances of the case would permit, she exercising at the time due diligence and care, and not being guilty of contributory negligence." The opening statement embodied in this instruction, that a higher degree of care is imposed upon street railways than upon ordinary steam railways, is not approved either as a proper method of defining a duty or as a correct statement of the law, although it was taken from the opinion in *Anderson v. Citizens St. R. Co.*, *supra*.

The care required to be exercised by a steam railroad company for its passengers is nowhere stated in the in-

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structions, but such a company is not before us, and

3. if it were could not complain because its duty was understated. The duty of a street railway company towards passengers is defined with reasonable accuracy in the residue of this instruction. *Indianapolis St. R. Co. v. Hockett, supra*; *Citizens St. R. Co. v. Jolly* (1903), 161 Ind. 80; *Citizens St. R. Co. v. Hoffbauer* (1900), 23 Ind. App. 614; *Kentucky, etc., Bridge Co. v. Quinkert* (1891), 2 Ind. App. 244; 5 Am. and Eng. Ency. Law (2d ed.), 558.

Instruction thirteen, given at the request of the appellant, expressly advised the jury that railway and traction companies are not insurers of the safety of their

4. passengers; and the instruction complained of, as well as many others, admonished them that appellee could not recover unless she was without fault or negligence contributing to her injury. It is conceded that, as a carrier, appellant is required to exercise the highest degree of care to secure the safety of its passengers, and is responsible for the slightest neglect when such negligence results in injury. In view of this strict requirement, and of other instructions given and of the conceded facts, we are clear that the objectionable part of this instruction could not have misled the jury or harmed appellant.

It is further contended that instruction four, given at the request of appellee, was erroneous, which instruction reads as follows: "The fact that the plaintiff undertook

5. to alight from the car at a time when the car was still in motion does not necessarily make her guilty of contributory negligence. As to whether she could alight in safety from the car at the time she undertook to do so, is a question of fact for you, gentlemen, to determine from all the facts and circumstances in the case. If you find from the evidence that, at the time she undertook to alight from the car, she could have done so with safety, by the exercise of due diligence and care, then she would not be

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guilty of contributory negligence, even though you find that the car had not come to a full stop.”

We have already shown that the court could not declare as a matter of law upon the conceded facts of this case that appellee was guilty of contributory negligence. What was said in the consideration of the first proposition argued, and the authorities there cited, uphold the correctness of this instruction, and it is accordingly our conclusion that no error was committed in giving the same to the jury.

No reversible error appearing in the record, the judgment is affirmed.

DITCHEY v. LEE.

[No. 20,786. Filed October 26, 1906.]

1. **APEAL AND ERROR.**—*Complaint.*—*Sufficiency.*—*Conclusions of Law.*—*Exceptions.*—*Same Questions Presented.*—Where the special findings show the same facts as alleged in the cross-complaint a decision on the exception to the conclusions of law renders unnecessary a decision on the sufficiency of such cross-complaint. p. 269.
2. **VENDOR AND PURCHASER.**—*Marketable Title.*—*Contracts.*—In the absence of an agreement to the contrary, the vendor of real estate is required to convey a marketable title. p. 272.
3. **WILLS.**—*Devises.*—*Charges on Land.*—*Words and Phrases.*—*Forfeitures.*—*Consideration.*—A will devising lands to testator's daughter “on condition” that she pay the mother \$100 annually, and making such payment a charge on the land, but making no provision for a forfeiture or a devise over in case of a default, merely encumbers such land with such payment, the collection of which may be coerced by foreclosure, the word “condition” being used in the sense of “consideration.” p. 273.
4. **VENDOR AND PURCHASER.**—*Marketable Title.*—*Wills.*—*Estates.*—A title to real estate which is perfect, with the exception of the title devised by a will, which charged an annuity of \$100 against such land during the life of testator's widow, is, with such lien excepted, a marketable title. p. 273.
5. **SAME.**—*Unmarketable Title.*—*Contracts.*—*Liens.*—*Assumption of Payment.*—*Consideration.*—A vendee may contract for

a defective title; and he may assume the payment of liens upon the lands conveyed either as a part of the consideration named in the deed or in addition to such consideration. p. 273.

6. **TRIAL.**—*Special Findings.*—*Liens.*—*Assumption of Payment of.*—A special finding that cross-defendant agreed to take the title to the purchased land "subject" to a certain lien, and "assumed" payment thereof, sufficiently shows that such cross-defendant agreed to pay such lien. p. 274.
7. **SAME.**—*Special Findings.*—*Vendor and Purchaser.*—*Bills and Notes.*—*Contracts.*—Where a vendee executed his note in part consideration for a certain conveyance, the contract requiring the vendee at a certain time to pay such note, whereupon the vendor should execute the deed of conveyance, an offer by the vendor at such time to execute such deed in accordance with the contract, and a refusal of the vendee to pay such note, warrant a recovery by the vendor. p. 274.
8. **EVIDENCE.**—*Contracts.*—*Contemporaneous Oral Declarations.*—The admission of the declarations of parties made during the negotiations resulting in the execution of the contract sued upon is not necessarily harmful to the party refusing to comply. p. 274.
9. **CONTRACTS.**—*Separate Instruments.*—*Deeds.*—*Mortgages.*—*Bills and Notes.*—A contract in writing, a deed, mortgage and notes, all executed as a part of one transaction will all be construed as constituting the contract. p. 275.
10. **EVIDENCE.**—*Parol.*—*Written Contracts.*—*Explanations.*—Parol evidence is not admissible to vary or contradict a written contract; but such evidence is admissible to explain the circumstances, to show the real consideration, to identify the subject-matter and to give effect to such contract. p. 275.
11. **CONTRACTS.**—*Assumption of Payment of Mortgage and Annuity.*—Where the devisee of lands charged with an annuity of \$100 payable to devisee's mother, sold same, reserving a mortgage for \$2,500 payable at her mother's death, and bearing four per cent interest, such interest constituting the annuity payment, a subsequent purchaser agreeing to pay such mortgage and annuity did not thereby assume a double payment of such annuity, but simply to pay as provided in the original agreement. p. 275.
12. **PLEADING.**—*Motion in Arrest.*—*Motion to Modify Judgment.*—*Special Findings.*—Where the special findings set out the facts alleged in the cross-complaint and fully sustain the judgment rendered, the decision thereon disposes of the questions raised by motions in arrest and for modification of the judgment. p. 276.

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From Clinton Circuit Court; *Joseph Claybaugh*, Judge.

Action by Jacob Ditchey against Charles W. Lee. From a judgment for defendant on his cross-complaint, plaintiff appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed*.

James V. Kent and *Harry C. Sheridan*, for appellant.

John C. Farber, for appellee.

MONTGOMERY, J.—Appellant brought this action for money paid upon a contract for the purchase of certain real estate. The complaint comprises five paragraphs. The answer consists of a general denial and an affirmative paragraph, to which a reply in three paragraphs was filed. Appellee also filed a cross-complaint founded upon a promissory note, which was answered in four paragraphs, to which answers appellee replied in denial.

The errors assigned and relied upon are that the cross-complaint does not contain facts sufficient to constitute a cause of action, that the court erred in each conclusion of law stated upon the special finding of facts, and in overruling appellant's motions for a new trial, in arrest of judgment, and to modify the judgment.

The merits of the controversy are most concisely exhibited by the special finding of facts; and appellant's exception to the conclusions of law stated thereon

1. renders it unnecessary to consider separately the charge that the facts averred in the cross-complaint are insufficient. *Ross v. Van Natta* (1905), 164 Ind. 557.

The following is a summary of the facts found by the court: On August 15, 1903, appellee was the owner in fee simple of lands particularly described, in Clinton county, containing ninety-seven and fifty one-hundredths acres, more or less. In the year 1892 Wilson Cohee died testate, the owner in fee of said lands, and by item seven of his last will, which was afterwards duly probated, he devised the same to his daughter, Rebecca F. Mushlitz, upon the condi-

tion that she pay to her mother, Susannah Cohee, during life, \$100 annually, which annual payment was made a charge thereon. On March 23, 1892, said Susannah Cohee duly filed her election in writing to take the provision made for her in said will, in lieu of her statutory rights in the estate of her deceased husband. On August 20, 1902, said Rebecca F. Mushlitz sold and, together with her husband, by warranty deed conveyed said lands to James P. Dudley, subject to an annual dower of \$100, payable to Susannah Cohee, the first payment to be made March 1, 1904, which deed was duly recorded February 26, 1903. On February 26, 1903, said Dudley, a single man, executed a mortgage on the lands to said Rebecca F. Mushlitz, to secure the payment of a promissory note for \$2,500, payable sixty days after the death of said Susannah Cohee, being the unpaid balance of purchase money for said real estate; and in the mortgage it was expressly stipulated that said Dudley, as and for interest upon the debt thereby secured, should pay annually to said Susannah Cohee \$100, beginning March 1, 1904, and continuing each year thereafter during the life of said Susannah Cohee, which mortgage was duly recorded February 27, 1903. On February 28, 1903, Dudley sold and by warranty deed conveyed said lands to appellee, subject to said mortgage and subject to an annual payment of \$100 to Susannah Cohee during her natural life, which charges appellee assumed and agreed to pay as a part of the purchase money for the lands, which deed was duly recorded March 3, 1903. On August 15, 1903, appellant, with full knowledge of the provisions of said will and of said mortgage, and of the deed from Dudley to appellee, and of the title to the lands, entered into a contract with appellee for the purchase of the lands, in pursuance of the terms of which appellee prepared, and, together with his wife, signed and duly acknowledged a warranty deed conveying the same to appellant, for a stated consideration of \$9,000; this deed contained provisions by which appellant

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assumed the payment of taxes commencing with the spring instalment of 1904, the Dudley mortgage of \$2,500, and \$100 annually to said Susannah Cohee during her life, as part payment of the purchase money for the lands. Appellant read, examined and approved said deed when so prepared and signed, and thereupon paid appellee \$900 in cash, and executed and delivered to him his promissory note for \$1,375, payable on or before March 1, 1904, with six per cent interest and attorney's fees, being the note sued upon in the cross-complaint, and appellant also signed four promissory notes for \$1,000 each, payable in one, two, three, and four years after date, and four notes for interest on the principal notes calculated at six per cent to maturity, and a mortgage on the lands to secure the payment of said four principal and interest notes. Appellant and appellee further agreed that said principal and interest notes and said mortgage should be placed in an envelope, sealed and deposited in the Clinton County Bank until March 1, 1904, when appellant was to pay the note for \$1,375, cause the mortgage to be dated, signed by his wife, properly acknowledged, and delivered, together with the notes secured, to appellee, and thereupon said deed from appellee should be delivered to appellant. The deed, notes and mortgages were placed in an envelope, sealed up, and taken by appellant and appellee and deposited with an officer of the American National Bank of Frankfort, the change of depository having been mutually agreed upon, and these papers so remained with said bank until the trial of this cause. A memorandum of the contract for the purchase and sale of said lands was, at the time, made in writing and signed by appellant and appellee, in which reference was made to said notes, mortgage and deed. On September 12, 1903, appellant paid appellee \$250 on the note for \$1,375, and on February 29, 1904, notified him that he would be unable to raise the money for the payment of the balance of said note, and on March 1, 1904, by one

McClamrock, offered appellee the sum of \$1,165.33 in payment of said note, on condition that appellee would release the lands from the annual payment or charge of \$100 to Susannah Cohee. Appellee thereupon declared that he could not release the annual charge, and had not contracted to do so, and offered to accept the money in payment of said note, but appellant refused to pay except upon condition that such charge be released. On March 1, 1904, appellee requested appellant to have said mortgage signed, acknowledged, and delivered, together with said notes, and to pay the balance of the note for \$1,375, and upon the same being done offered to deliver said deed, and ever since has been able, willing, and ready to deliver the deed and to convey the lands in accordance with said contract, but appellant failed to do as requested. The balance of principal and interest due on said note is \$1,200, and a reasonable attorney's fee thereon is \$70, which amounts are due and owing from appellant to appellee upon the note sued upon in the cross-complaint and remain unpaid. Said Susannah Cohee is alive, but appellant refused to make the annual payment to her March 1, 1904, as required by the terms of said contract and deed.

As conclusions of law upon these facts the court stated: (1) That appellant take nothing, and that appellee recover costs upon the issues joined on the complaint; (2) that appellee recover of appellant on the cross-complaint \$1,270, together with costs.

Appellant's learned counsel base their principal contention upon the proposition, that in the absence of an agreement to the contrary, the vendor of real estate is

2. required to convey a marketable title. *Small v. Reeves* (1860), 14 Ind. 163; *Smith v. Turner* (1875), 50 Ind. 367; *Goodwine v. Morey* (1887), 111 Ind. 68; *Morris v. Goodwin* (1891), 1 Ind. App. 481; *Puterbaugh v. Puterbaugh* (1893), 7 Ind. App. 280. This general proposition of law is well settled, but, when applied

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to the case at bar, it is not decisive of appellant's contention. The will of Wilson Cohee, deceased, devised the lands in controversy to his daughter, on condition

3. that she pay to her mother during life \$100 annually; and the payment was made a charge upon the lands. No provision was made for a forfeiture of the title, nor was devise over made to the widow or to any one else in the event of default in payment and forfeiture of the title by the daughter. It is clear that the word "condition" was used in the will in the sense of consideration, and that the title devised was not conditional, but was merely encumbered with an annual charge of \$100 during the lifetime of Susannah Cohee. The title devised was absolute, subject only to the specific lien charged against it, and in case of default in payment the remedy would be a foreclosure of the lien, and not a forfeiture of the land. *Van Horn v. Mercer* (1902), 29 Ind. App. 277.

This interpretation of the will, which we think plain—beyond serious controversy—leads to the conclu-

4. sion that the chain of title exhibited, apart from liens, is good and marketable.

A purchaser of land may contract to accept a defective title and a conveyance without covenants of general warranty, and may also assume outstanding liens upon

5. the land conveyed, either as part of the consideration named in the deed, or in addition to such stated consideration. *Allen v. Lee* (1848), 1 Ind. 58, 48 Am. Dec. 352; *Rockhill v. Spraggs* (1857), 9 Ind. 30, 68 Am. Dec. 607; *Pitman v. Conner* (1866), 27 Ind. 337; *Robinius v. Lister* (1868), 30 Ind. 142, 95 Am. Dec. 674; *McDill v. Gunn* (1873), 43 Ind. 315; *Davis v. Hardy* (1881), 76 Ind. 272; *Carnahan v. Tousey* (1884), 93 Ind. 561; *State, ex rel., v. Kelso* (1884), 94 Ind. 587; *Stanton v. Kenrick* (1893), 135 Ind. 382.

Appellant insists, however, that it is not shown that he assumed payment of the lien created by the will of Wilson

Cohee, deceased. The fact is not found in precise
6. terms, but the finding is that appellant agreed to take the title subject to the payment of \$100 annually to Susannah Cohee, during her natural life, and assumed the payment thereof. It is not specifically found that this charge was a lien created by will, or by some form of contract, but the necessity of making a conveyance subject to this payment inevitably implies the lien; it was enumerated among other liens assumed, and it is not apparent to us how the character of the instrument by which the lien was created could materially affect the rights of the purchaser. In our opinion the finding is sufficiently specific upon this point, and the first conclusion of law correct.

The court found that the note sued upon in the cross-complaint was executed by appellant in pursuance of his contract with appellee and in part payment for the
7. land, and that at the time agreed upon appellee requested appellant to perform his part of said contract, and thereupon proffered a deed, duly signed and acknowledged, conveying the title in accordance with the terms of the contract, and at all times since had been able, willing, and ready to comply with the conditions of said contract on his part. These facts authorized a recovery upon the note, and justified the second conclusion of law. *Small v. Reeves* (1860), 14 Ind. 163; *Melton v. Coffelt* (1877), 59 Ind. 310; *Sowle v. Holdridge* (1878), 63 Ind. 213; *Schierman v. Beckett* (1882), 88 Ind. 52; *Goodwine v. Morey* (1887), 111 Ind. 68; *Washington Glass Co. v. Mosbaugh* (1898), 19 Ind. App. 105.

Complaint is made in the motion for a new trial of the admission of oral evidence. The objectionable evidence involved conversations and statements of appellant's

8. occurring prior to, and concurrently with, the execution of the contract between the parties, and related wholly to the subject-matter in controversy. Conceding that the contract is in writing, we are unable to say

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that there was error in the admission of this evidence, or that any harm resulted therefrom to appellant.

The memorandum, the notes, mortgage, and deed executed at the same time and as parts of one transaction, and the other papers referred to therein, constituted the

9. contract between the parties. *Leach v. Rains* (1897), 149 Ind. 152; *Schmueckle v. Waters* (1890), 125 Ind. 265; *Carr v. Hays* (1887), 110 Ind. 408; *Ireland v. Montgomery* (1870), 34 Ind. 174; *Guaranty, etc., Loan Assn. v. Rutan* (1893), 6 Ind. App. 83.

It is an elementary proposition that parol evidence is not admissible to impeach or vary the contents of a written contract, or to control its legal effect; but such evi-

10. dence is competent to explain the circumstances under which the writing was executed, to show the real consideration upon which it rests, to identify the subject-matter where proper reference is made, and to give effect to the contract. *Kentucky, etc., Bridge Co. v. Hall* (1890), 125 Ind. 220; *Martindale v. Parsons* (1884), 98 Ind. 174; *Mace v. Jackson* (1871), 38 Ind. 162; *Harris v. Doe* (1837), 4 Blackf. 369; *Howard v. Adkins* (1906), ante, 184. These principles and authorities justified the admission of the oral evidence of which complaint is made.

It is contended that the findings are not sustained by the evidence. It clearly appears from the contents of the writings that appellant expressly assumed and

11. agreed to pay \$100 annually to Susannah Cohee during life, and also assumed the payment of a mortgage executed by Dudley to Rebecca F. Mushlitz for \$2,500, to become due sixty days after the death of said Susannah Cohee, by the terms of which the mortgagor was required to pay as interest thereon \$100 annually on March 1 to said Susannah Cohee. Appellant's counsel suggests that these stipulations provide for a double annual payment to Mrs. Cohee. If this were so, it would probably not release appellant from the contract; but we think it clear that

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such a construction would be contrary to the intention of the parties. The annuity was made a charge upon the land primarily by the will of Wilson Cohee in his devise to his daughter, and when she parted with the title she required the purchaser to assume this payment, and provided that \$2,500 of the purchase money should remain unpaid until after the death of Mrs. Cohee, which should bear interest at an equivalent of four per cent and be payable directly to Mrs. Cohee. The successive purchasers assumed like obligations, so that, under the arrangements, the holder of the title was at all times liable as principal for this annuity and chargeable with any default in its payment. It is manifest that the payment of \$100 annually to Susannah Cohee satisfied the provisions of the will, and the one payment was all that was ever contemplated by the parties to this action. In our opinion the terms of the contract were not enlarged, varied, or contradicted by the parol testimony admitted, but the writings themselves sustain and justify the findings of the court. The motion for a new trial was properly overruled. What has been said necessarily disposes of the motion in arrest and for a modification of the judgment.

No error being shown the judgment is affirmed.

**STATE, EX REL. GARN, v. BOARD OF ELECTION
COMMISSIONERS OF MARSHALL COUNTY**

ET AL.

[No. 20,940. Filed October 31, 1906.]

1. **ELECTIONS.—Ballots.—Preparation of.—Political Parties.**—While the printing and distribution of the official ballots are entrusted to public officers (§6214 Burns 1901, Acts 1889, p. 157, §17), still the selection and certification of its candidates are left to the respective political parties. p. 282.
2. **SAME.—Nominations.—Ballots.—Election Commissioners.—Statutes.—Mandatory.**—Section 6214 Burns 1901, Acts 1889,

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- p. 157, §17, providing that the election commissioners shall place on the official ballot under the party emblem the nominees selected "at the time and place designated in the call of the regularly constituted party authorities," is in the highest degree mandatory. p. 283.
3. **ELECTIONS.—Political Parties.—Rules.—County Chairmen.—County Conventions.**—A county chairman regularly selected, under the call of the controlling state central committee, by the precinct committeemen, regularly chosen under the call of such state central committee, is, together with such precinct committeemen, the proper authority to call a county convention of such party. p. 284.
4. **EVIDENCE.—Judicial Notice.—Republican Party.**—Courts take judicial notice that there is but one Republican party in this State. p. 284.
5. **ELECTIONS.—Official Ballots.—County Nominations.—Political Parties.**—County nominations made by a convention not called by the county central committee selected under the regular call of the Republican state central committee, cannot be placed on the official ballots as the nominees of the Republican party. p. 284.
6. **SAME.—Official Ballots.—Nominations.**—Nominations made by a county mass convention called by persons who claimed to be, but who were not, the Republican county central committee, have no legal right to the party emblem on the official ballots. p. 285.
7. **SAME.—Political Parties.—Divisions.—Courts.—Jurisdiction.**—Courts have jurisdiction to determine which of conflicting lists of candidates claimed to be made by a political party, is entitled to go on the official ballot under the emblem of such party. p. 285.
8. **PLEADING.—Mandamus.—Election Commissioners.—Ballots.—Certificates of Nominations.**—A petition for mandate against the county board of election commissioners to compel them to place the names of certain nominees on the official ballots, as those of a certain party, must allege that the nomination certificates filed therefor show that the nominating convention designated the title of the party and the figure or device to be placed upon the ballot, as provided by §6215 Burns 1901, Acts 1889, p. 157, §18. p. 287.
9. **APPEAL AND ERROR.—Record.—Trial.—Decisions.**—The trial of a cause upon appeal is by the record and not by briefs or argument of counsel. p. 287.
10. **SAME.—Supreme Court Rules.—Error in Record.—How Shown.**—Error, to be available on appeal, must be properly

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- saved in the trial court and presented in the Supreme Court according to the rules of practice therein prescribed. p. 287.
11. **APPEAL AND ERROR.—Error.—How Shown.—Searching for, Though Not Pointed Out.**—The Supreme Court will not look beyond appellant's brief to ascertain errors for reversal, but may search the record to sustain the judgment, though appellee should file no brief. p. 288.
12. **SAME.—Pleading.—Complaint.—Law of the Case.**—A reversal of a judgment sustaining a demurrer to a complaint necessarily settles plaintiff's right to judgment upon proof of the allegations of such complaint. p. 288.
13. **ELECTIONS.—Official Ballots.—Election Commissioners.—Public Duty.**—An action to mandate the board of election commissioners to place on the official ballots the names of the nominees of a party is a matter involving the highest public interest. p. 289.
14. **APPEAL AND ERROR.—Decisions.—Judgment.—Binding Force.—Election Commissioners.—Substantive Law.—Procedure.**—Appellees, the county board of election commissioners, are bound by the substantive law pronounced in the decision, on appeal, of a cause to which they were parties, though the judgment of the lower court in their favor was affirmed, such affirmance being occasioned by a mere matter of procedure. p. 289.

From Marshall Circuit Court; *Harry Bernetha*, Judge.

Action by the State of Indiana, on the relation of Edward Garn, against the Board of Election Commissioners of Marshall county and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

John W. Parks and *Merrill Moores*, for appellant.

Charles Kellison, *L. M. Lauer*, *H. A. Logan*, *Smith & Korbley* and *Morton S. Hawkins*, for appellees.

GILLETT, J.—September 29, 1906, relator, a citizen of Marshall county, filed his petition for an alternative writ of mandate, to require the board of election commissioners of said county, and John R. Jones and Francis Marion Burkett, constituting a majority of said board, to place on the official ballots, to be used at the next general election, in the second column of said ballot, under the device of

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the eagle, and accompanied with the designation, "Republican ticket," a certain list of names of persons who had respectively been nominated for certain designated county offices. An alternative writ was issued by the court, and appellees Jones and Burkett appeared and filed separate demurrers to the writ. These demurrers were sustained, and final judgment was rendered against relator.

Aside from certain practice questions, counsel for appellees offer but one objection to the complaint, and that is based on the contention that the facts alleged at most show a case wherein the board has a discretion to determine which of the two tickets it will permit to go upon the ballot as the ticket of the Republican party.

It is alleged in the petition and writ that the manner in which the Republican party of Indiana is organized is as follows: "In every voting precinct in the State a precinct committeeman is biennially elected by the voters of the precinct at a time fixed by the state central committee. In every county the precinct committeemen constitute the county committee, and choose their own officers under rules established by the state central committee, which consists, and for many years has consisted, of thirteen members, chosen one from each congressional district by the Republican voters of the district. In each district is a district committee consisting of the chairman of each county committee and of the member of the state committee for the district. The governing body of the entire organization is the state central committee, to which all local organizations and committees are inferior and subordinate." It fully appears that the adherents of said party in the thirty-three voting precincts of Marshall county met, pursuant to the call of said state committee, and elected precinct committeemen, who organized and selected relator as the chairman of the county organization; that said county committee and its chairman have at all times been recognized by the state committee; that the list of nominees, which the

relator seeks to have recognized as constituting the Republican ticket, was selected by a convention held upon a call issued by relator, by the direction of said county committee and pursuant to the rules of said state committee, to the Republicans of said county; that the convention, whose nominees it is charged appellees intend to recognize as constituting the candidates on the Republican ticket, was called by persons claiming to be members of the Republican county committee, but who were not such in fact, and that said convention, having been a mass convention, was held contrary to an existing rule of the state committee, which rule is specially pleaded. It is further alleged that although demand has been made upon defendants that they place the list of nominees of said first-mentioned convention in the second column of the ballot, under the name and device of the Republican ticket, said defendants have refused to state what they will do, but that it is their intention and purpose to postpone action until the adjournment of the September term of the Marshall Circuit Court, for the purpose of avoiding mandate proceedings, and that they will then, in the printing of the ballots, cause the other list of nominees to be set out thereon in the place and under the name and device of the Republican ticket.

The election law provides that "in each county in the State, the clerk of the circuit court and two persons by him appointed, one from each of the two political parties that cast the largest number of votes in the State at the last general election, shall constitute a county board of election commissioners. * * * It shall be the duty of such board to prepare and distribute ballots for election of all officers to be voted for in such county other than those who are voted for by all the electors of the State. §6214 Burns 1901, Acts 1889, p. 157, §17. The next section contains the following provisions: "The said board of election commissioners shall cause to be printed on the respective ballots the names of the candidates nominated by the conventions

of any party that cast one per cent of the total vote of the State at the last preceding general election, as certified to said boards by the presiding officer and secretary of such convention. * * * The certificate of nomination by a convention or primary election shall be in writing, and shall contain the name of each person nominated, his residence and the office for which he is nominated, and shall designate a title for the party or principle which such convention or primary election represents, together with any simple figure or device by which its list of candidates may be designated on the ballots; said certificate shall be signed by the presiding officer and secretary of such convention, or by the chairman and secretary of the county, city or township committee, who shall add to their signatures their respective places of residence, and acknowledge the same before an officer duly authorized to take acknowledgments of deeds.

* * * In case of a division in any party, and claim by two or more factions to the same party name, or title, or figure, or device, the board of election commissioners shall give the preference of name to the convention held at the time and place designated in the call of the regularly constituted party authorities, and if the other faction shall present no other party name, title or device the board of election commissioners shall select a name or title, and place the same before the list of candidates of said faction on the ballot, and select some suitable device to designate its candidates. If two or more conventions be called by authorities claimed to be the rightful authorities of any party, the proper board of election commissioners shall select some suitable device to distinguish one faction from the other, and print the ballots accordingly. * * * Certificates and petitions of nomination of candidates for offices to be voted for by electors of any district or division of the State exclusively shall be filed with the clerks of the circuit courts of the counties or county included in or including such district or division." §6215 Burns 1901, Acts 1889, p.

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157, §18. Section 6222 Burns 1901, Acts 1897, p. 49, §1, provides that "the device named and list of candidates of the Democratic party shall be placed in the first column on the left-hand side of said ballot; and of the Republican party in the second column."

In the adoption of the Australian ballot system, under which a voter is required to register his choice upon an indistinguishable ballot, it was necessary that pro-

1. vision should be made by law whereby the printing and promulgating of the ballots should be taken out of the hands of political parties and individuals, and that the performance of these duties should be vested in public officers. Although constrained to do this from the necessity of the case, yet the lawmaking power, recognizing the potency of political parties as agencies of government, and being cognizant of the fact that the integrity of such an organization largely depends upon its ability to place before voters, under the party insignia, a list of candidates for office who stand for those tenets concerning government that the organization is supposed to represent, made provision for the placing of party tickets upon the ballot. As to the two larger parties, express provision was made concerning the place of each upon the ballot, it being provided that the list of candidates of the Democratic party should be placed in the first column and that the list of Republican candidates should occupy the second column. In order, so far as possible, to avoid controversies relative to the question as to which of two or more lists of candidates should be placed upon the ballot under a particular party name and device, it was provided that in case of division in any party, accompanied by a claim of two or more factions of the party of the right to use the name and device thereof, preference should be given to the list of candidates nominated by a convention "held at the time and place designated in the call of the regularly constituted party authorities," and it was further provided that if the other faction

or factions failed to present some other party name and device, the board should select a name and device to designate the candidates thereof.

Where it appears that a list is composed of the nominees of a convention, which has been held at the time and place designated in the call of the regularly constituted

2. party authorities, it is the duty of the board, there being a regular certificate of nomination, to set out such list of names in the proper place and under the party name and title, and this duty is in the highest degree mandatory. Having ascertained the facts stated, it is the plain duty of the board to follow the requirements of the statute. As was said in *State, ex rel.*, v. *Houser* (1904), 122 Wis. 534, 551, 100 N. W. 964: "The exclusive use of the party name by a particular organization, after it has achieved such significance as to be entitled to recognition as one specially privileged to appear on the official ballot, was evidently deemed by the legislature to be a matter of vital importance to such organization, to the candidates named by it, and to the people of the state at large. It was thought to be necessary to the integrity of the organization, and important to the people generally as an indication of the principles to prevail contingent upon the candidates bearing its stamp, so to speak, being elected. It was thought to be a matter of the highest importance to the electors, to the end that they might not be misled into indorsing principles in form to which they were opposed in fact." The same idea finds expression in *State, ex rel.*, v. *Metcalf* (1904), 18 S. Dak. 393, 100 N. W. 923, 67 L. R. A. 331, where it was said: "It is for the party to nominate; for the people to elect. The question is not, who shall be chosen to any particular public office? That is for the voters of all political parties to determine at the polls. It is simply, who shall represent the organization as its nominees? and certainly the determination of that question should be con-

trolled by the action of the party itself; otherwise, party nominations are impossible."

There can be no question under the facts pleaded that the Republican county central committee, of which relator is the chairman, was the regularly constituted author-

3. ity for the calling of a convention of the Republican party in Marshall county. As we have seen, the manner in which the Republican party is organized in the State is specially pleaded. Basing the claim alone upon the facts which have been specially alleged, it appears that said committee has at least a pretty well fortified basis for the claim that it is the regularly constituted party authority in the matter of calling a Republican county convention.

However, since the great parties are agencies of

4. government, and their organization and existence constitute facts of a public and general nature, which all well-informed persons are presumed to know, we are justified in affirming that we have judicial knowledge of the fact that there is but one party having the name of Republican party, to which any considerable portion of the citizenship of the State give adherence. When to this element of judicial knowledge there is added the

5. special facts which are alleged concerning the manner in which the party is organized, we have a case in which it is clear that a convention which was not held under the sanction of the call of such committee was not entitled to have its nominees placed before the voters as constituting the Republican ticket. We need not seek to determine whether the decision of the state committee as to who constitute the local authorities is sufficiently potent in any case to place a claim of regularity on the plane of legal right. What we do decide is that a call for a local convention which is issued by the county central committee, which has been selected and organized pursuant to the call of the state central committee, and is acting pursuant to

its rules, is the "call of the regularly constituted party authorities."

As to the mass convention, we have seen that it is charged that it was called by persons claiming to be officers of the republican county central committee, but who were

6. not such in fact, and that it was held in conflict with the rules of the state committee. Such nominations are to be regarded as independent nominations. As was said in *Fernbacher v. Roosevelt* (1895), 90 Hun 441, 450, 35 N. Y. Supp. 898: "They do not come under the head of the regular party nomination whose convention has chosen the device under which the nominations of that convention are to be presented to the people." The nominees of such a convention, no matter what may be the numbers or supposed grievances of the persons participating in the movement, have no just claim under the statute to have their names placed under the party title and emblem. The statute makes the test of right to party representation the fact that the convention presenting the list of names was held at the time and place designated in the call of the regularly constituted party authorities. The question as to who constitutes such authorities is one which ordinarily can readily be determined under the rules of law. Those who see fit to separate themselves from the regular party organization, cannot claim the privileges which attach to it. A court is not the forum for the determination of questions of a political character,

7. but, as between a dissenting local organization and the representatives of the general body in the locality, the courts, recognizing the fact that those who thus separate themselves are dissenters, deny to them the rights which belong to the regular membership. It is with a party as with a church, the courts will not attempt to settle those questions of right and duty arising in the organization which are so complex that individual opinion must for each man be the final arbiter, but, as respects rights of property,

or whatever is so analogous thereto as to be cognizable by the courts, the rule is, even in the case of an adhering minority, that it is those who adhere and submit themselves to the regular order of the general organization, and not the seceding majority, who are to be recognized as the representatives of the general organization in the locality. *Smith v. Pedigo* (1896), 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 838. It is stated by a leading author that, "a candidate nominated by electors is not the nominee of a political party, but of the individual electors nominating him, even though all of the electors signing the nominating paper be members of the same political party. Such electors cannot, by choosing the name of a political party authorized to make nominations by convention, make such nominee the nominee of such party." McCrary, *Elections* (4th ed.), §702.

Assuming the truth of the facts alleged by relator, it is clear that a convention which was held at the time and place designated in the call of the central committee, of which relator is the chairman, was the convention whose nominees should be recognized, upon the filing of a proper certificate as required by law, as the candidates whose names should go upon the ballot as constituting the Republican ticket of nominees for the various offices to which they have been nominated, and that, upon these facts appearing, they should appear in the place on said ballot designated for the Republican ticket, and under the name and emblem of the party.

Thus far we have written upon the merits; and, without being at the pains to state the objections which counsel for appellees urge to the petition and writ, we may state that, having carefully considered such objections, we regard them as unavailing.

There is a defect in said pleadings, however, which must work an affirmance, although it has not been pointed out,

and that is that it is not alleged that the certificate

8. of nomination of the candidates nominated by the convention held upon the call of relator designated the title of the party and the figure or device by which its candidates were to be designated upon the ballots, pursuant to §6215 Burns 1901, Acts 1889, p. 157, §18. In the opinion of the writer, the pleadings were also defective, in that they did not show that said convention was held at the place designated in the call of said party authorities. But whether this proposition is valid or not, the former cannot be escaped, for it is certainly incumbent upon the relator to bring himself within the statute; that is, to show that the facts require that the defendants should do what he demands of them. As was said in *Matter of Madden* (1895), 148 N. Y. 136, 140, 42 N. E. 534: "The right to a column depends upon a nomination's having been made and certified."

As was said by Woods, J., in *Martin v. Martin* (1881), 74 Ind. 207, 210, wherein a cause was affirmed on grounds which were not stated or suggested in the briefs: "The counsel have greatly mistaken both the practice and the duty of this court. The issue tendered for our decision

by the appellant in every case of appeal is, that

9. 'there is manifest error in the record,' in some specified particular or particulars. The appellee joins issue and says there is no error. The trial is by the record, not by the argument of counsel, and the appellant has no right to prevail, and we should be derelict in duty if we permitted him to prevail, unless the error is made manifest. No matter what error the court below

10. may have committed, it is not manifest in the record, unless saved in the lower court and presented in this court, in accordance with the rules of practice. These rules of practice are the law of the land, their reasonableness is justified by experience, and, unless ready to abrogate, we have no right to disregard them. We never

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go beyond the brief of the appellant to search the record in quest of errors which have not been pointed out

11. in the brief; but the appellee, without filing any brief at all, is entitled to the benefit of everything in the record which may prevent a reversal of the judgment upon the errors assigned; and, because the counsel on both sides may discuss some question with very great learning and ability, as was done in this case, we are not therefore permitted to shut our eyes against the fact, which we cannot otherwise help seeing, that the question is not in the record. The silence of the appellee on any point is not equal to an agreement to waive the point; the burden is on the appellant to show the error which he has assigned." In *Powell*, App. Proc., p. 126, it is said: "Hence it is to be seen that the appellate court, in reviewing the record upon the question of error, will examine the whole record, and if, in so doing, they find in other parts of the record what will justify or neutralize the error assigned and pointed out, the court will not reverse the judgment." See, to the same effect, *Jones v. Castor* (1884), 96 Ind. 307; *Wilson v. State* (1901), 156 Ind. 631; *Irvin v. Rushville, etc., Tel. Co.* (1903), 161 Ind. 524. As was said in *Travelers Ins. Co. v. Prairie School Tp.* (1898), 151 Ind. 36: "We may not ignore what we do see that will prevent a reversal of the judgment." In *Elliott*, App. Proc., §186, the authors said: "The courts have again and again adjudged that appeals are heard upon the record and by the record determined." See, also, *Big Creek Stone Co. v. Seward* (1896), 144 Ind. 205; *Scott v. City of Laporte* (1904), 162 Ind. 34, 51. To reverse a case because of the sustaining of a demurrer to the complaint must necessarily settle

12. as the law of the case the right of the appellant to recover upon proof of the state of facts alleged in the complaint. To do this on the ground that the appellees, who are evidently striving in every way to uphold the judgment, have failed to make the particular point would

be a perversion of justice. As was said in *Big Creek Stone Co. v. Seward*, *supra*: "If the court were limited to the arguments and reasoning of counsel in its decisions of cases, to the exclusion of its own observations, many cases would lead us far from what we understand to be the true object of the court."

Before passing on the question which counsel for the parties evidently considered the fundamental question in the case, we deliberated long upon the question as

13. to whether it was our duty to do this, and we have reached the conclusion that it is. Public considerations alone gave the relator the right to wage the question which he seeks to present. The spectacle of a large body of voters being led by what, in practical effect, is a false pretense, to give their suffrages to candidates who are without the sanction of the party they claim to represent, is abhorrent. The question is *publici juris* in the highest degree. It was said by the supreme court of Wisconsin, where a question of representation on the state ballot was presented: "The public rights involved are important in the highest degree. No case has arisen in recent years that more closely concerns all the people than this one. Nothing short of a decision by the highest authority in our judicial system would be at all satisfactory or adequate to meet the situation." *State, ex rel.*, v. *Houser*, 122 Wis. 534, 554, 100 N. W. 964. Recognizing the public interests which

are bound up in the question, that the election is at
14. hand, and assuming that appellees, in view of their oath of office and the penalties prescribed for a wilful violation of the election laws, will regard it as incumbent upon them to follow the determination of the State's highest judicial tribunal, we have conceived that we have not gone further than we are warranted in passing upon the merits, and that, in view of the manner in which an affirmance has been brought about, we are not open to the criticism of incorporating *obiter* into our decision in de-

ciding such question. Appellees may claim an affirmance on a ground which they have not suggested, but, having joined with their adversary in invoking our judgment on the main point, they are in no position to complain that the court, in view of the public character of the controversy, has not been silent on the essential question involved. It is the order of the court that this opinion be certified to the court below forthwith.

Judgment affirmed. All concur, except Montgomery, J., who votes for a reversal and files a separate opinion.

DISSENTING OPINION.

MONTGOMERY, J.—The manifest theory and purpose of the relator's petition is to present to the court for settlement the conflicting claims of two lists of county candidates to the right to have their names printed in the second column of the official ballots, under the title of the Republican party and the emblem of an eagle. No suggestion appears to have been made in the court below that the nominating convention convoked by relator was not shown to have been held at the place designated in the call therefor, nor is anything disclosed in this controversy making the place of holding such convention a matter of importance. No such question is raised or discussed in the briefs of counsel upon appeal. The determination of the controversy presented and urged turns wholly upon the question as to which of the rival lists of candidates shall be recognized as the genuine Republican ticket. All other questions are subsidiary to this, and the formal defects in the petition pointed out in the majority opinion are such as could and doubtless would have been cured by amendment, upon suggestion of their existence, and not having been presented or insisted upon by counsel upon appeal, this court is warranted in considering only the alleged defects passed upon by the lower court, and treating all others as waived. It is not the imperative duty of the members of this court to

become attorneys for appellees and to scan records for grounds upon which to sustain the decision of the court below, which grounds as rational men they know to a moral certainty did not affect the ruling in question, but which as judges they assume might have done so. It is averred that the relator was chosen county chairman in strict conformity to the governing rules and under the supervision of the Republican state organization, and that ever since his election as such chairman he has been recognized by the Republican state and district committees as chairman of the Republican county central committee of Marshall county.

This averment was, perhaps, essential to the jurisdiction of the court, and is decisive of the question under consideration. The writer of the principal opinion attempts to determine the question by tests which are appropriate in controversies involving property rights, but which are wholly inadequate to the solution of a purely political matter. The question involved is one essentially political and not judicial in its character. It has been generally held that such questions will be relegated to the voters for settlement, and the courts will not attempt to investigate the government, usages or doctrines of political parties, and to exclude from the official ballots the names of candidates placed in nomination, on the ground that they are not proper representatives of the political doctrines or party government of the party to which they profess allegiance, but such questions are to be settled primarily by the party tribunals. *Stephenson v. Board, etc.* (1898), 118 Mich. 396, 76 N. W. 914, 74 Am. St. 402, 42 L. R. A. 214, and cases cited. This recognition by the highest tribunals of the party involved gives regularity and validity to the acts of the relator as such chairman, from a partisan standpoint, and is controlling upon the courts. *Breidenthal v. Edwards* (1896), 57 Kan. 332, 46 Pac. 469, 34 L. R. A. 146; *Moody v. Trimble* (1900), 109 Ky. 139, 58 S. W. 504, 50

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L. R. A. 810; *Phillips v. Gallagher* (1898), 73 Minn. 528, 76 N. W. 285, 42 L. R. A. 222; *In re Fairchild* (1897), 151 N. Y. 359, 45 N. E. 943; *State, ex rel., v. Houser* (1904), 122 Wis. 534, 100 N. W. 964.

No controversy having been disclosed over the place of holding the nominating convention, that matter is immaterial in the determination of the question presented. If in point of fact the nominations are not certified in writing, as required by law, they are not entitled to go upon the ballots at all.

The genuine list, when properly certified, must be recognized and given its proper place upon the ballots, while the pretenders must be assigned a different column, name, and device.

It follows that the list of candidates nominated at the convention convoked by the relator on June 2, 1906, is the genuine list of Republican candidates, and as such is entitled to be placed in the second column under the party name and emblem on the official ballots, and this right having been denied them as alleged, upon the sole ground of a lack of party regularity and genuineness, the petition is sufficient to afford the relief sought. I therefore dissent from the conclusions reached by a majority of the court, and vote for a reversal of the judgment.

AMERICAN EXPRESS COMPANY v. SOUTHERN INDIANA EXPRESS COMPANY.

[No. 20,441. Filed November 1, 1906.]

1. CONSTITUTIONAL LAW.—*Fourteenth Amendment.—Statutes.—Carriers.—Express Companies.*—Sections one and four of the act of 1901 (Acts 1901, p. 149, §§3312b, 3312e Burns 1901), providing for the equal treatment of express companies by one another in this State, and for penalties for failure or refusal by any such companies to treat others on equal terms, are not

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in violation of the fourteenth amendment of the federal Constitution, providing for equal rights and for due process of law. *Adams Express Co. v. State*, 161 Ind. 328, followed. pp. 308, 313.

2. **INJUNCTION.**—*Express Companies.—Discrimination.—Statutes.*—Injunction lies, by virtue of §3312e Burns 1901, Acts 1901, p. 149, §4, to compel defendant express company to grant to plaintiff express company the same terms and privileges in the carriage of plaintiff's express matter, which defendant grants to other companies. pp. 309, 315.
3. **EQUITY.**—*Enlarging Jurisdiction.—Legislative Powers.*—The legislature has the power to enlarge the jurisdiction of the courts of equity. p. 310.
4. **CARRIERS.**—*Express Companies.—Rates.—Common-Law Duties.*—At the common law, express companies were under no obligation to treat all customers alike. p. 311.
5. **COMMON LAW.**—*Insufficiency of, to Meet Modern Requirements.*—While, formerly, the common law was elastic enough to provide a remedy for flagrant injustice, it has not in modern times kept abreast of progress; and the legislature has been compelled to supply new remedies to meet existing conditions. p. 311.
6. **CARRIERS.**—*Express Companies.—Prepayment of Charges.—Waiver.—Statutes.*—Section 3312b Burns 1901, Acts 1901, p. 149, §1, does not compel defendant express company to prepay charges on packages received from other companies, but does require defendant to do so for plaintiff, where it does so for other express companies, defendant's prepayment as to the others being a waiver of its right to refuse to prepay for plaintiff's packages. pp. 311, 313.
7. **COMPETITION.**—*Public Policy.—Common Law.*—All usages, customs, rules and practices designed to prevent competition are contrary to public policy and were condemned by the common law. p. 312.
8. **POLICE POWER.**—*Liberty.—Property.*—The state may in the proper exercise of the police power sacrifice the property of individuals, curtail natural privileges, and restrict, or entirely take away, the liberty of the citizen. p. 312.
9. **COMMERCE.**—*Interstate.—What is.*—State laws which may to some extent affect interstate commerce are not necessarily bad on the ground that they regulate interstate commerce. p. 313.
10. **CONTRACTS.**—*Right of.—Legislative Power.*—The right to contract may be restricted by the legislature, or in some cases, may be prohibited. p. 314.

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11. PLEADING.—*Argumentative Denial.*—*Sustaining Demurrer to.*—*Appeal and Error.*—Sustaining a demurrer to argumentative denials, is harmless error where the general denial was pleaded. p. 314.
12. JUDGMENT.—*Motion to Modify.*—*Express Companies.*—*Equal Privileges.*—*Statutes.*—A decree commanding defendant express company to grant certain specified privileges and terms to plaintiff express company, such privileges and terms being the same voluntarily yielded by defendant to other express companies, is warranted by §3312e Burns 1901, Acts 1901, p. 149, §4. p. 315.
13. CONSTITUTIONAL LAW.—*Carriers.*—*Express Companies.*—*Discrimination.*—Sections one and four of the act of 1901 (Acts 1901, p. 149, §§3312b, 3312e Burns 1901), providing for equal treatment by express companies of one another in this State and for a penalty for a violation of the provisions thereof, are not in violation of the federal Constitution, article 1, §8, providing that the federal congress shall regulate interstate commerce, or section one of the fourteenth amendment, or article 1, §§21, 23, of the state Constitution, providing for equal rights and due process of law. p. 315.

From Lawrence Circuit Court; *James B. Wilson*, Judge.

Suit by the Southern Indiana Express Company against the American Express Company. From a decree for plaintiff, defendant appeals. *Affirmed.*

Matson & Giles and *Baker & Daniels*, for appellant.

F. M. Trissal, *J. H. Shea* and *Brooks & Brooks*, for appellee.

JORDAN, C. J.—Appellee company, as plaintiff below, on May 31, 1901, commenced this suit under an act of the legislature, approved March 7, 1901 (Acts 1901, p. 149, §§1, 4, §§3312b, 3312e Burns 1901), to secure an injunction compelling appellant to extend to said plaintiff like facilities, terms, privileges, advantages, and usages in the receiving, transmission and delivery of express matter within the State of Indiana which said defendant had granted to all other express companies.

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On May 12, 1902, plaintiff filed an amended complaint in two paragraphs. The defendant unsuccessfully demurred to each of these paragraphs on the grounds: (1) That the court had no jurisdiction over the person of the defendant; (2) that the plaintiff had no legal capacity to sue; (3) that the paragraphs did not state facts sufficient to constitute a cause of action. Thereupon defendant filed its answer in five paragraphs, the first of which was the general denial. A demurrer for want of facts was sustained to each of the paragraphs of the answer except the first. On February 19, 1904, the cause was tried by the court on the issues joined upon the amended complaint and the answer of general denial. There was a general finding in favor of the plaintiff, and the court awarded a decree, enjoining and prohibiting the defendant from refusing to extend and grant unto the plaintiff equal terms, facilities, accommodations, usages, privileges, and advantages in the receipt, transmission, carriage, continuance of carriage, and delivery of money and property, which defendant extended and granted to other express companies; but the court excluded from the operation of said decree of injunction property worth less than the transportation charges and also perishable property.

Upon the entering of this decree the defendant filed a motion to modify. This motion is as follows: "The defendant in the above-entitled cause moves that the court correct and modify the decree rendered in this cause * * * by adding to the last paragraph of the decree and at the end of said paragraph the following paragraphs and each of them, to wit: First. And this decree shall only be applied to such packages weighing seven pounds and less as plaintiff, in advance of tendering to the defendant, shall agree with the defendant that the same shall be carried on the basis of one through rate for the entire carriage, and there shall be one equal division of said rate between the plaintiff and the defendant, and if there be an

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odd cent in said division it shall be taken by the carrier making delivery to the consignee. Second. This decree shall be effective as to future interchange of traffic between the plaintiff and defendant only when and so long as the plaintiff shall bind itself to the defendant to guarantee the payment to the defendant of any and all of advanced charges paid defendant to plaintiff which the defendant is not able to collect from the consignee thereof, provided the defendant shall give notice to the plaintiff, within sixty days after payment of such advanced charges, that the same cannot be collected from the consignee. Third. This decree shall be effective as to future interchange of traffic between the plaintiff and defendant only when and so long as the plaintiff shall bind itself to the defendant to interchange traffic reciprocally with the defendant upon accommodations which shall be the same to the defendant as the connecting carrier's tendering package for continuance of carriage to destination on plaintiff's line or route as are received and had by plaintiff as the connecting carrier's tendering packages for continuance of carriage to destination on defendant's line or route."

The defendant also filed its motion for a new trial, assigning the following reasons: "(1) That the decision of the court is not supported by sufficient evidence; (2) that the decision of the court is contrary to law." Each of these motions was overruled, to which rulings the defendant excepted.

The errors assigned in this appeal, and upon which appellant relies for reversal, are the following: (1) The amended complaint does not state facts sufficient to constitute a cause of action; (2) overruling the demurrer to the first paragraph of the amended complaint; (3) overruling the demurrer to the second paragraph of said complaint; (4) sustaining demurrer to the second paragraph of answer; (5) sustaining demurrer to the third paragraph of answer; (6) sustaining demurrer to the fourth para-

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graph of answer; (7) sustaining demurrer to the fifth paragraph of answer; (8) overruling motion to modify decree; (9) overruling motion for new trial.

The evidence given upon the trial is brought into the record by a bill of exceptions.

Plaintiff alleged in the first paragraph of its amended complaint that it is a corporation organized and doing business under the laws of the State of Indiana; that for three years last past it has been engaged in the business of carrying money, merchandise and other articles over the Southern Indiana Railroad Company's line in Indiana; and since May 16, 1901, up to the present date it received and agreed to receive compensation for such services; that since then continuously it has been engaged in consigning to defendant and other express companies such things so carried by it for transportation by such express company over railroads in the State of Indiana; that during all the time mentioned it has been and still is a responsible express company; that on May 16, 1901, it had and now has a paid-up cash capital of \$50,000, and no liability existing against it. It is alleged that it is a joint stock association, and for twenty years last past has been engaged in the State of Indiana in carrying, over railroads, money, merchandise, and other articles for hire; that said defendant is and during all of said time has been granting to the Adams Express Company, the Southern Express Company, and other express companies, facilities, accommodations, and usages in the receipt, carriage, continuance of carriage, and delivery of such express matter, and terms, credits, advantages, and usages in the receipt, transmission and delivery of such express matter which the defendant has continuously refused, and still refuses, to the plaintiff; that said advantages consist in the defendant's maintaining business connections with such other express companies, whereby said defendant received from them, and they received from defendant, express packages and each paid the

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carrying charges of the preceding carrier, and each completed the carriage and delivered such articles and collected from the consignee and retained all the charges of itself and of each preceding carrier.

The first paragraph further alleges that the plaintiff continuously and daily from May 16, 1901, tendered to the defendant express matter to be received and accepted by said defendant under equal terms and under the terms, credits, etc., in the receipt, transmission, and delivery of all express matter at all of said times granted by the defendant to said other express companies; that the defendant has refused to receive said packages, and by so refusing, unlawfully and unjustly discriminates against this plaintiff. The paragraph then sets out and assigns three specific instances of packages of express matter tendered and refused on May 30, 1901, to wit: (1) A package from Seymour, Indiana, consigned to Edward Corr, of Bloomington, Indiana, and carried by plaintiff to Bedford, and there tendered to the defendant, which the latter refused to receive and accept. (2) A package from Freetown, Indiana, consigned to Noble Moore, at Mitchell, Indiana, which was carried by plaintiff to Bedford, and tendered to defendant, and by it refused. It is averred that defendant's line passes through Bloomington and Mitchell, Indiana. (3) A package from Selma, Indiana, consigned to Dr. W. H. Livingston, Danville, Indiana, and carried by plaintiff to Bedford, and at that point tendered to defendant and by it refused. That defendant's line extends from Bedford to Danville, Indiana, and that all the aforesaid packages were received by the plaintiff in the usual course of business. It is alleged that along plaintiff's line there are, and for months past have been, thirty stations where it has maintained agencies; that the railroad over which the plaintiff maintains its line is over 160 miles in length, and that at each of its said agencies said plaintiff has since May 16, 1901, daily received express packages which were

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consigned to persons in divers cities and towns in the State of Indiana, in which the defendant had and has agencies, and to which its line runs; that each day hereafter the plaintiff will receive packages along its line. It is further alleged that the defendant threatens to continue to refuse packages tendered to it by the plaintiff, will refuse to pay plaintiff's carrying charges, will refuse to complete the carriage of such packages, will refuse to receive from the consignee all the carrying charges, and will refuse to receive from plaintiff such packages and pay the carrying charges accrued thereon, unless enjoined from so doing; and that thereby the plaintiff will suffer irreparable injuries, the amount of which is impracticable to compute or ascertain, but which does not exceed the sum and value of \$1,500. The paragraph closes with the prayer for a mandatory injunction on the final hearing.

The facts alleged in the second paragraph of the amended complaint are virtually the same as in the first, except that it contains fuller allegations as to the character of the plaintiff's incorporation. It avers that the plaintiff is a corporation organized in pursuance to the statutes of the State of Indiana, and that its purpose and business is to receive, and speedily to forward, deliver and transport over lines of railway and other public highways, by means of public and private conveyance, under the care of special messengers or otherwise, goods, etc., and to receive and forward for collection, bills, notes, etc., and, upon receiving payment, to return the money to the consignor, and also to receive and forward all articles of trade, etc., with the bill and charges of the shipper attached thereto to be collected, etc., and to return the amount of the charges to the shipper. Also to perform for the public all offices that by usage are incident to the forwarding business by the class of carriers known, recognized, and designated by the public as express carriers. It is further alleged in this paragraph that "defendant received from all express companies, except plain-

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tiff, and from all persons, express matter for delivery on its lines and at its offices without the prepayment of the charges for transportation, but collected the same from the consignee.”

Defendant, in the second paragraph of its answer, substantially alleges that it is a copartnership, and that under the name of the American Express Company it is, and for twenty years has been, engaged in the business of an express carrier in Lawrence county, Indiana, and has carried, and still carries, money and other articles for hire on certain railroads in said State, and especially a railroad running through the city of Bedford and extending to Danville, Bloomington, and Mitchell, in said State of Indiana. It is alleged that the defendant's express business during the time aforesaid extended, and still extends, over railroads by connections over uninterrupted routes through the State of Indiana and into the states of Ohio, Pennsylvania, New Jersey, New York, Michigan, Illinois, and other states of the United States; that during all of said time it has received, and still receives and agrees to receive, compensation for its carrying services; that its routes and lines of express business, connected at various points in Indiana and other states with the lines and routes of other express carriers doing a like state and interstate express business, to wit, the United States Express Company, Wells-Fargo Express Company, Southern Express Company, and other express companies; that during all of the aforesaid time the defendant did, and still does, under agreements made between it and said other express companies, respectively receive from and deliver to each of them in the State of Indiana both intrastate and interstate express matter, and did and does advance to each of them their accrued charges thereon, and did and does receive from them its own accrued charges on express matter delivered by it to them.

This paragraph further alleges that the defendant on delivering to the consignee such matter transferred to it,

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collected and collects from said consignee all accrued express charges of itself and all preceding carriers; that it did not and does not so receive express matter from other carriers, or deliver to them except in cases where there is an agreement with them; that such agreement embraced both intrastate and interstate business; that without such agreement respecting interstate business no agreement upon the subject of interchange business would have been made by the defendant; that such agreements secured the defendant a guaranty of repayment of such accrued charges in case the consignee refused to pay them, and in such case the agent of the transferring carrier did pay to the defendant's agent receiving the transfer the charges advanced by and those earned by defendant if a claim for same was made within sixty days; that the agreement contained a stipulation that on packages of seven pounds or less the through rate over the two or more lines should not be greater than either company would charge for its carriage for the same number of miles, had either company singly carried the same, and that this through rate should be equally divided between the carriers, the odd cent, if any, being taken by the company making the delivery to the consignee; and that within the last five years there has been no other custom, usage, or arrangement between defendant and any other express company respecting interchanging business.

The paragraph further avers that the plaintiff did not at any time before this suit was commenced, and especially on the day it tendered to defendant the packages mentioned in its complaint, have any agreement with the defendant respecting interchange business and up to the time of such tender the plaintiff and defendant had not interchanged express matter under any reciprocal agreement, and plaintiff had not offered, and did not offer at the time of said tender, to enter into any such agreement, and did not at the time of such tender offer to pay defendant's charges for carrying said packages, and did not offer to guarantee to

defendant the repayment of plaintiff's accrued charges or defendant's charges to be earned in the event that it could not be collected from the consignee, and it did not offer to put in force between the plaintiff and defendant a through rating and division of the through rate similar to the rating and division thereof in force between the defendant and such other express companies; that if the provisions of the express companies' statute of Indiana, approved March 7, 1901 (Acts 1901, p. 149, §§3312b-3312f Burns 1901), required the defendant under these circumstances to receive the packages tendered, and to advance plaintiff's accrued charges thereon and so to receive all similar packages so tendered by plaintiff, then it is alleged that said statute is void, because it is in violation of §8, article 1, and §1 of the fourteenth amendment to the Constitution of the United States, and also of §§21 and 23 of article 1 of the Constitution of Indiana, and that unless the provisions of said statute be so construed, plaintiff cannot have and maintain this suit. Wherefore judgment is demanded.

The third paragraph of the answer substantially alleges that the defendant is a joint stock association or copartnership, usually called an express company, not organized under the laws of Indiana, and that it is regularly engaged, and has been since March 29, 1879, continuously in the business of carrying money and property over and upon railroads in the State of Indiana; that it agrees to receive and does receive compensation therefor, and was so engaged in said State prior to the time when the statute in relation to foreign express companies (§§3306-3308 Burns 1901, Acts 1879 [s. s.], p. 146) was enacted; that upon the taking effect of the aforesaid act, and long before May 16, 1901, the defendant duly and fully complied with section two of said act of 1879, by executing and filing in the office of the recorder of Lawrence county, Indiana, the "agreement" mentioned in that section, authorizing process issued against the defendant to be served upon its express agents,

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and further authorizing judgment to be rendered thereon in *personam* against the defendant copartnership in such actions, all in the manner as is provided in said section; that continuously since the filing of said agreement the defendant has, in pursuance of the rights and privileges secured to it by the act of 1879, *supra*, enjoyed such rights and privileges in the transaction of its express business in said State of Indiana and said county of Lawrence; that on May 15, 1901, at midnight of said day, the Secretary of State of the State of Indiana certified as then in force said statute, approved March 7, 1901; that the defendant's acceptance of the provisions of said act of March 29, 1879, became a contract between the defendant and the State of Indiana, which was, on May 15, 1901, and still is in full force, unless the act of March 7, 1901, *supra*, which attempted a repeal of the act of 1879, *supra*, and attempted to annex conditions to defendant's right to transact an express carrier business in Indiana different from those defined and authorized by said act of 1879, be a valid statute of Indiana; that the right to have and maintain this suit rests wholly upon, and does not exist without, the provisions of said act of 1901; and that said act is null and void because under the facts herein alleged it violates §10, article 1, of the Constitution of the United States, in that it impairs the obligation of said contract between the defendant and the State of Indiana. Wherefore judgment is demanded.

In the fourth paragraph of answer the defendant averred that it is a copartnership and association of persons, usually called an express company, and had been for five years in the business of carrying money and property over and upon railroads operated in Indiana and in said Lawrence county; that in receiving and agreeing to receive compensation for such carriage the Southern Indiana Express Company did tender to the defendant the express packages mentioned in the complaint for continuance of carriage from said city of Seymour to destination, but that such

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tendering company did not pay or offer to pay defendant's charges for such carriage, and did demand from defendant said tendering company's accrued charges for the carrying of said packages to Bedford, and did not offer to guarantee defendant against loss of either of said charges, in case the consignee would not pay them, and thereupon the defendant declined to receive and carry said packages and to advance said accrued charges; that said Southern Indiana Express Company was then a corporation organized and existing under the laws of the State of Indiana, but was not a responsible express company, nor an express company of any kind, because there never had been a statute of Indiana authorizing the incorporation of express companies; that said company, by its certificate of incorporation and articles of association, declared itself to be organized as a forwarding express company in pursuance of the statutes of Indiana relating to voluntary associations and corporations, which articles were filed June 22, 1898, in the office of the Secretary of State of the State of Indiana, and there was then but one statute authorizing the incorporation of forwarding companies, viz., clause fifteen of section one of the voluntary association act of 1893 (Acts 1893, p. 289), which reads: "To organize forwarding and commission companies, and to own and operate wharf-boats in connection therewith, upon any of the rivers within or bordering upon the State of Indiana;" that said company was incorporated in pursuance of said subsection, and not otherwise; that it, in assuming to exercise the franchise of an express company common carrier, and to transact an express carrier business, as especially touching the express packages mentioned in the complaint, acted wholly *ultra vires* its charter, and could not and did not legally bind its assets and property, although in that behalf it attempted to act and claimed to be acting as a corporation, and not as a copartnership or otherwise. The paragraph closes with a prayer for judgment.

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The fifth paragraph of the answer alleges that the defendant is a joint stock company organized under the laws of the state of New York more than five years before the commencement of this suit, and was not incorporated anywhere and was not organized in the State of Indiana; that during all of that time it was a common carrier of goods for hire over various railroads of many of the states of the United States and over a railroad in the city of Bedford, Lawrence county, Indiana; that, prior to the commencement of this suit, the plaintiff was doing an express carrier business over the Southern Indiana Railroad through the city of Bedford to the city of Terre Haute, in the State of Indiana; that after May 15, 1901, plaintiff made a general demand that defendant should receive at junction points from plaintiff express packages carried thereto by it, and destined to points on defendant's line, and that immediately upon defendant's receipt thereof the defendant should pay plaintiff's accrued charges thereon, and that defendant should accept such packages without prepayment of defendant's charges or without a guaranty of such payment, if the consignee should not pay them, and without agreeing that on a package weighing seven pounds or less the freight charges should be the same as though it were to be carried only over a single express route, and that this through rate should be equally divided between plaintiff and defendant, the odd cent, if any, being taken by the company completing the carriage.

Said paragraph further alleges that up to the time of plaintiff's said general demand, and of the tender of the particular packages mentioned in the complaint, the defendant had not by custom, usage, contract, arrangement, agreement, or otherwise, or in fact ever, accepted of another common carrier a package like those in question for continuance of carriage or delivery, where such tendering carrier had not (1) made with defendant a through rate from point of origin to point of destination on all packages,

which rate was not greater than the single rate of either carrier had the whole carriage been over but one line; (2) made an agreement for an equal division of such through rate; (3) agreed to refund to defendant any accrued charges that defendant might advance to it if not collectible from consignee; (4) agreed to pay defendant its charges on the package if not collectible from the consignee; (5) agreed that if defendant should tender such other carrier like express matter for completion of carriage, to make one through rate thereon, divide such rate equally, advance defendant's accrued charges, and secure the payment to it of all uncollectible charges by defendant's guaranty of collection.

It is further alleged that the plaintiff making said tenders to defendant did not offer to do any of said five things hereinbefore mentioned, and did not intend to do any of them, but demanded that defendant carry the tendered packages on credit as respects defendant's charges thereon and advance to the plaintiff the latter's charges which were its full legal rate, being twenty-five cents on each of said tendered packages, instead of twelve cents, the amount receivable on a through rate by any of said other express companies and without any obligation on plaintiff's part to refund either of said charges to defendant if not collectible from the consignee; that when making said tender plaintiff did not have a purpose to make such through rating, division thereof, or reimbursement, but intended to take the facilities it demanded, and which defendant refused, without itself making a reduced or through rate, and without paying or agreeing to pay either of said charges if the consignee should refuse to pay them, and therefore the defendant charges that while the privileges, accommodations, and facilities were such as this defendant granted other express companies, yet the conditions upon which the demand was made by plaintiff were different from and more favorable to the plaintiff than those that then existed or had hereto-

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fore existed in any case where the defendant had taken such express matter from any other carrier for completion of carriage, and that such difference of conditions was to the advantage of the plaintiff and to the disadvantage and injury of the defendant; that if the act of the General Assembly of March 7, 1901 (Acts 1901, p. 149, §3312b *et seq.* Burns 1901), shall be construed as requiring defendant to submit to such unequal conditions and to acquiesce in such advantage to plaintiff, then said act is in contravention of section one of the fourteenth amendment to the Constitution of the United States, and is therefore void; that if said act shall be so construed, then plaintiff is not entitled to the relief for which it prays. This paragraph closes with a demand for judgment.

The statute upon which this action is based, by its title, professes to relate to express companies, "defining their duties, prohibiting discrimination and combinations, declaring certain acts to be unlawful," etc. So much of the first section of the act of 1901, *supra*, as is material to the question involved in the case at bar is as follows: "That all copartnerships, associations of persons, individuals, joint stock associations, corporations, or companies, usually called express companies, now engaged, or that may hereafter engage in the business of carrying or transporting money, merchandise or other articles, over, or upon any of the railroads operating in this State, and receiving or agreeing to receive compensation for such services, shall grant to each and all consignors, including other responsible express companies as consignors, equal terms, facilities, accommodations and usages, in the receipt, carriage, continuance of carriage, and delivery of money and property usually carried by express companies, and they are prohibited from granting to any one carrier, class or combination of carriers, any terms, credit, privileges, advantages, usages, accommodations or facilities in the receipt, transmission or delivery of express matter that they do not grant

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to all others, and the granting of any credit, privileges, terms, usages, facilities or advantages to any one person, carrier, company or combination or class or companies, carriers or persons, that are not granted to all other responsible carriers or persons shall be, and is hereby declared unjust and unlawful discrimination."

Section four of said act provides that "any such carrier, corporation, copartnership, or association failing to comply with any of the provisions of this act or violating any of the provisions thereof, shall, upon being convicted of any such failure or violation in an action to be brought in the name of the State of Indiana by the prosecuting attorney of the county in which the offense occurs, forfeit and pay to the State \$500 for each offense, and the commencement of such action, service of process and proceedings therein shall conform to the rules governing proceedings in civil actions. And such offending carriers, corporations, associations or copartnerships shall also be liable in any court of competent jurisdiction in a civil action to be brought by and in the name of any person injured by any violation of this act, and such person may recover threefold the amount of his actual damages shown, and shall also have a remedy by injunction in any circuit or superior court of this State to command any of the acts or things required to be done and to prohibit any of the acts forbidden by this act, and the word 'person' herein, shall be construed to include any corporation, copartnership, or association of persons."

The constitutional validity of the statute upon which this action is based is assailed by appellant's learned counsel for various reasons. It is asserted that sections

1. one and four are both violative of §1 of the fourteenth amendment to the federal Constitution for the reasons that they attempt (1) to deprive appellant of its right to demand prepayment of its carrier charges, which right, as it insists, it has under the common law, and which is a property right; (2) to require an express car-

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rier which desires to advance accrued charges to one connecting carrier to make such an advancement to all responsible carriers, and by so doing the statute attempts to compel the making of a "forced loan," which amounts to the taking of the property of one person and giving it to another; (3) to take from express companies their common-law right to contract with reference to interchange traffic, and such right, it is asserted, is one of property.

This same statute was involved, and in the main the same constitutional objections thereto were advanced and urged against it, in the case of *Adams Express Co. v. State* (1903), 161 Ind. 328. In fact, the questions raised in that appeal to all intents and purposes are the same as those presented and argued in the case at bar. They were fully considered by the court and held to be untenable, and the constitutional validity of the statute was sustained, and we are satisfied to accept the decision in that appeal, so far as applicable, as a ruling precedent upon the points or questions raised and discussed in this case. It is evident

that each paragraph of appellee's complaint is

2. founded upon sections one and four of the act in controversy. The pleader does not attempt under either of these paragraphs to invoke any remedial right or rights other than those awarded by the provisions of the statute. Therefore, the points advanced by appellant's counsel that neither paragraph discloses any ground for equity jurisdiction, for the reason that it appears that appellee has an adequate remedy at law in the recovery of damages for the wrongs of which it complains, and for the further reason that under the facts alleged it has not brought itself within the well-recognized maxim, which avers that "he who seeks equity must do equity," do not apply.

It will be seen that under section four, *supra*, in addition to the actions thereby provided, one in the name of the State for a penalty and the other by the party injured

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to recover threefold the amount of the actual damages sustained, the legislature deemed it proper to provide expressly that such person "shall also have a remedy by injunction in any circuit or superior court of this State to command any of the acts or things required to be done and to prohibit any of the acts forbidden by this act." The acts required to be done, as declared by section one, *supra*, are that such express companies "shall grant to each and all consignors, including other responsible express companies as consignors, equal terms, facilities, accommodations and usages, in the receipt, carriage, continuance of carriage, and delivery of money and property usually carried by express companies." The acts which such companies are forbidden to do are "granting to any one carrier, class or combination of carriers, any terms, credit, privileges, advantages, usages, accommodations or facilities in the receipt, transmission or delivery of express matter that they do not grant to all others." The legislature clearly

has the right by statute to enlarge the equity powers

3. of a court, and thereby authorize it to grant equitable relief in matters or cases in which, in the absence of such statute, the court would have no equity jurisdiction. *Eilenbecker v. District Court* (1890), 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; *Arment v. Hensel* (1892), 5 Wash. 152, 31 Pac. 464; *Carleton v. Rugg* (1889), 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193, 14 Am. St. 446.

By its averments each paragraph of the complaint shows that the appellant has violated or declined to obey the provisions of section one by refusing to grant to appellee "facilities, accommodations, and usages in the receipt, carriage, continuance of carriage and delivery of express matter," etc. The pleading specifies what constituted the accommodations and facilities, etc., granted by appellant to other express companies, but which it denied to appellee. In fact three specific cases are given of express packages

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tendered by appellee to appellant which the latter refused to receive and carry. Among other things, it is shown that appellee is a responsible express company and is seeking by this action to compel appellant, by a mandate of the court, to grant to it the same terms, facilities, etc., which appellant gives or grants to other responsible express companies. It is undoubtedly true that at common law no

such duty or duties would rest upon appellant as

4. appellee in this action seeks to compel it to perform. By the common law the duty of a common carrier is to carry for all persons, for a reasonable remuneration to be paid by each, but such carrier is under no obligation to treat all of its customers or patrons alike, hence in the absence of the statute in question appellee would have no standing to ask that appellant discharge the duties which it demands. The insufficiency of the common law to afford a remedy was no doubt recognized by the legislature, and induced the enactment of the act in

5. controversy. Formerly the elasticity of the common law and its adaptability to apply to and govern new conditions and things was regarded as one of its crowning virtues, but in the great commercial age in which we live the common law has not, in all respects, been equal to the many new conditions or emergencies which have arisen, or been able to keep pace with the great march of events, hence the legislature has been from time to time required to enact statutes to meet, regulate, or control the great interests which affect the rights and common welfare of the people. Such is the character of the act now under consideration. It is not tenable to argue that this act operates to deprive appellant of a right to demand

6. carrier charges, for it only operates to take away the right of appellant to demand the prepayment of such charges from appellee while it waives the prepayment thereof from all other express companies, and all persons who ship or express freight or goods over its lines. Re-

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gardless of the statute, appellant still has the right to require prepayment of such charges provided it treats appellee and all persons equally in this respect. Or, in other words, by the provisions of the statute in question, it must, under like or similar conditions or circumstances, treat "Trojans and Tyrians without discrimination." In the appeal of *Adams Express Co. v. State*, *supra*, this court said: "The purpose of the statute was to prevent express companies and other common carriers doing business in this State from unfairly and unjustly discriminating against other persons or corporations engaged in the same business, by extending to some carriers advantages and facilities which were denied to others. Of late years many important enactments of this character, state and federal, have been found necessary for the protection of the interests of the people. All rules, practices, customs,

7. and usages designed to destroy competition in business, or necessarily having that effect, are inimical to the public well-being, and were condemned by the common law. The act under examination belongs to that class of legislation which has been found necessary to prevent the destruction of competition, and the exclusive possession by a few of the great fields of industry and enterprise. It has never been denied that in the exercise of the

8. police power property rights may be sacrificed, natural privileges curtailed, and liberty restricted or taken away. As the public peace, safety, and well-being are the very end and object of free government, legislation which is necessary for the protection and furtherance of this object cannot be defeated on the ground that it interferes with the common-law rights of some of the citizens, or even deprives them of such rights." Citing numerous authorities.

It is evident that if appellant advanced the accrued charges to one connecting carrier, then it must advance

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such charges to other responsible express companies.

6. It was the vice of discrimination in the receiving and transportation of express matter which the statute intended to prevent. It in effect commands that the express carrier shall receive and carry upon the same terms merchandise and other goods delivered to it for carriage by other responsible express companies or other consignors. The law applies equally to both appellant and appellee, and each can demand of the other the advantages of all facilities, customs, usages, terms and credits which such other company grants or allows to its most favored patron or customer. *Adams Express Co. v. State, supra.*

In the latter case we held, and properly so, that the act in question did not attempt to regulate interstate commerce.

The same point is again advanced by appellant in

9. this appeal. But it cannot be said that everything which may affect commerce is regulation thereof within the meaning of the federal Constitution. *Chicago, etc., R. Co. v. Iowa* (1876), 94 U. S. 155, 24 L. Ed. 94; *Express Cases* (1886), 117 U. S. 1, 6 Sup. Ct. 542, 29 L. Ed. 791; *Missouri, etc., R. Co. v. Haber* (1898), 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878. Even if it can be asserted that this statute incidentally operates to affect interstate commerce, still that would not render it invalid, for, in the absence of legislation on the part of congress, the decisions of the Supreme Court of the United States affirm that a state may, under its police power, pass reasonable laws, local in their operation, although they may incidentally affect interstate commerce. See *United States Express Co. v. State* (1905), 164 Ind. 196, and cases cited on page 204 of the opinion.

In the case last cited, the validity of an act of the legislature of this State, requiring express companies to deliver express matter to all persons to whom the same was

1. consigned who resided within the limits of cities having a population of twenty-five thousand or

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more, was involved. It was urged in that appeal, as in the case at bar, that the act in question operated to deprive express companies of liberty and of property without due process of law, and therefore it was antagonistic to the fourteenth amendment of the Constitution of the United States. This contention the court denied. In passing upon the question as presented in that appeal we said: "Under the police power persons may be deprived of both liberty and property, at least in a sense, and that without redress, provided that it be by due process of law. Of course, the mere act of the legislative power does not necessarily amount to due process of law, or, what is its equivalent, the law of the land. *McKinster v. Sager* [1904], 163 Ind. 671, 68 L. R. A. 273, 106 Am. St. 268, and cases there cited. However, every presumption must be indulged by the courts which the circumstances reasonably admit of, that the legislative authority was warranted in enacting the statute. 'While it may be conceded that, gen-

10. erally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts.' *Frisbie v. United States* [1895], 157 U. S. 160, 165, 15 Sup. Ct. 586, 39 L. Ed. 657."

The second, third, and fourth paragraphs of appellant's answer to appellee's complaint are substantially the same as were those considered and held to be insufficient

11. in stating a cause of defense in *Adams Express Co. v. State, supra*. It may be said, however, that these several paragraphs, and likewise the fifth paragraph of answer, constitute nothing more than an argumentative denial, and the facts therein alleged, so far as competent, were admissible under the general denial which constituted the first paragraph of the answer. *Jeffersonville Water Supply Co. v. Riter* (1897), 146 Ind. 521; *Indiana, etc.*,

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Oil Co. v. O'Brien (1903), 160 Ind. 266. The ruling of the court, therefore, in sustaining the demurrer thereto, even if erroneous, under the circumstances was harmless.

Counsel for appellant argue that the fifth paragraph of answer presents the defense that appellee could not secure injunctive relief at common law. This we have

2. conceded, but, as previously stated, the suit is based upon the statute in question, and not upon the common law.

There was no error in denying the motion to modify the decree. The latter is in harmony with the finding of the court, and it fully conforms to the provisions of the

12. statute upon which this action is founded. By its terms appellant is only in effect commanded to treat appellee as it treats other express companies, under like conditions and circumstances. The finding of the court is sustained by the evidence upon every material point.

In conclusion, we adjudge that the statute here involved does not violate any of the provisions of the state or federal Constitutions, as pointed out and relied

13. upon by appellant. There are some other questions presented which we need not expressly refer to, as they were presented and considered and properly decided adversely to the contention of appellant's counsel in *Adams Express Co. v. State*, *supra*. We find no reversible error, and the judgment is, therefore, affirmed.

Montgomery, J., did not participate in this decision.

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[No. 20,779. Filed November 1, 1906.]

1. CRIMINAL LAW.—*Larceny.—Felonious Intent.—Contributions.—Religious Associations.*—The soliciting and receipt of money, by defendant, at a church, with the intent to appropriate such

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money to his own use, falsely representing to the contributors that such money was to be used for a certain benevolent purpose, constitute the felonious elements of larceny. p. 317.

2. **CRIMINAL LAW.**—*Larceny.*—*Voluntary Contributions.*—The fact that contributors voluntarily gave their money to defendant, with no expectation of its return, at a church contribution, upon the false representation that such money was received for, and was to be used in, the erection of a certain building for benevolent purposes, is no defense to a charge of larceny, where defendant so falsely received such money with the felonious intent to appropriate it to his own use. p. 318.
3. **SAME.**—*Larceny.*—*Fraud.*—*Trick.*—*Possession.*—*Trespass.*—*Title.*—The receipt of money by means of a trick or device, where defendant had a preconceived design to steal same, is larceny, since the possession so obtained is not legal and the owner retains the constructive possession of such money, a conversion thereof constituting a trespass, and therefore larceny. p. 318.
4. **SAME.**—*Larceny.*—*Evidence.*—*Sufficiency.*—Where defendant secured permission from the pastor of a church upon the false representation that he represented a certain benevolent enterprise, and falsely took a collection for such purpose, appropriating the money so collected to his own use, he is properly convicted of larceny. p. 318.
5. **EVIDENCE.**—*Declarations.*—*Larceny.*—Evidence of the declarations of defendant, charged with the larceny of certain contributions received by him upon his false representation that such money was to be used in the work of a certain benevolent enterprise, as to the institution with which he was connected in the raising of such money, is admissible. p. 318.

From Criminal Court of Marion County (35,084); *Fromont Alford*, Judge.

Prosecution by the State of Indiana against Charles H. Towns. From a judgment of conviction, defendant appeals. *Affirmed.*

Foster C. Sherley, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

HADLEY, J.—Appellant obtained consent of the pastor of Grace Presbyterian church to occupy his pulpit, and

make an appeal to the public for voluntary contributions for the building, at Jeffersonville, Indiana, of a mission home for ex-convicts, by falsely representing to the pastor that he was the general secretary and representative of a national organization of Christian workers, with headquarters at Battle Creek, Michigan, and that the object of said organization was to construct such homes in various parts of the country, and that his mission in Indianapolis was to raise funds for a home in Jeffersonville, which would cost \$1,500, and that he had at the time in hand or pledged \$1,100 of the amount. At a public meeting in the church appellant addressed the audience at length, repeating the representations he had made to the pastor, and, after an earnest plea as to the merits of his mission, requested persons in his audience to make cash contributions, or sign pledge cards if not prepared with the money. There was no such organization at Battle Creek, Michigan, as appellant claimed to represent. He afterward told the detective who made the arrest that he had collected \$97, all of which, except \$8, he had kept for expenses, and the balance he had forwarded to the secretary and treasurer of the Christian Aid Society at Battle Creek, Michigan. The prosecuting witness, with others, believing the statements and representations and relying thereon, made a contribution of money.

Appellant was indicted and convicted of petit larceny, and assigns as error the refusal of the court to grant him a new trial. The real question is whether appellant's offense was larceny or obtaining money under false pretense.

Under the facts disclosed by the evidence and stated above there can be no doubt but that the defendant had formed the design to obtain money by deception, to

1. appropriate what he got to his own use, and to deprive the contributors of it. These purposes existing in his mind at the time he solicited and received the

money constituted the felonious elements of larceny. *Fleming v. State* (1894), 136 Ind. 149.

That the money was given up with the owner's consent and without expectation of its return can make no difference, if the possession was obtained by a fraudulent

2. lent trick or deception, and with the felonious intent not to return it, nor use it for the purpose represented by him and intended by the contributors, but to appropriate it to the taker's own use. *Stillwell v. State* (1900), 155 Ind. 552, 559; *Crum v. State* (1897), 148 Ind. 401, 407; *March v. State* (1889), 117 Ind. 547.

The reason of the rule is thus stated: "Where the defendant, with a preconcerted design to steal the property, obtains possession of it by fraud, the taking is

3. larceny, for the reason that, as the fraud vitiated the transaction and left the title in the original owner, he still retains a constructive possession of the goods, and a conversion of them by the defendant is such a trespass to that possession as makes larceny." Gillett, *Crim.*

Law (2d ed.), §540. There was evidence justifying

4. the jury in finding the defendant guilty of larceny.

While the State was delivering its evidence, a witness on direct examination, after testifying to certain statements made by the defendant, was asked by the prosecut-

5. ing attorney the following question: "You may state what he said, if anything, as to what institution he was connected with in raising the money." All the evidence goes to show that appellant represented publicly and privately that he was the agent and general secretary of a benevolent association at Battle Creek, Michigan, and it was the theory of the State that this representation was false, and but a part of the defendant's scheme to deceive the people. In support of the theory the question was proper.

Judgment affirmed.

AMERICAN EXPRESS COMPANY v. THE STATE.

[No. 20,563. Filed November 2, 1906.]

1. **PLEADING.—Answer.—Facts Provable Under Another Paragraph.—Demurrer.**—It is harmless error to sustain a demurrer to a paragraph of answer whose facts are provable under another. p. 320.
2. **CONSTITUTIONAL LAW.—Carriers.—Express Companies.—Refusal to Receive Packages from Others.**—The act of 1901 (Acts 1901, p. 149, §§3312b-3312f Burns 1901), requiring express carriers within this State to treat all consignors, including other express companies, on equal terms, and not to grant unequal privileges to any, is constitutional. *Adams Express Co. v. State*, 161 Ind. 328, and *American Express Co. v. Southern Ind. Express Co.*, ante, 292, followed. p. 320.

From Monroe Circuit Court; *James B. Wilson*, Judge.

Action by the State of Indiana against the American Express Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

J. E. Henley and *Baker & Daniels*, for appellant.

Robert G. Miller, *Arthur M. Hadley* and *Brooks & Brooks*, for the State.

JORDAN, C. J.—This action was commenced in the Lawrence Circuit Court by the State of Indiana, through the proper prosecuting attorney, to recover the penalty provided by section four of an act of the legislature approved March 7, 1901 (Acts 1901, p. 149, §§3312b-3312f Burns 1901). The cause was venued to the Monroe Circuit Court, wherein, upon the issues joined, it was tried by the court. There was a special finding of facts, and a judgment for plaintiff for \$500. Upon the special findings the court stated its conclusions of law in favor of the State, to which appellant duly reserved its exceptions. Judgment was rendered upon the findings in favor of the State and against the appellant in the sum of \$500, together with costs.

167	319
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p167	707

The action appears to be based on the fact that appellant company had violated the provisions of section one of said statute by refusing to accept from the Southern Indiana Express Company—an express company doing business in the State of Indiana—an express package for carriage over and upon the lines of appellant to a point within the State of Indiana.

Appellant's answer to the complaint consisted of six paragraphs, the first being the general denial. A demurrer for want of facts was sustained to all of the para-

1. graphs except the first. Each of the paragraphs to which the demurrer was sustained, under the averments thereof, was nothing more than an argumentative denial, and the facts therein set up, so far as they could be pertinent to the action, were admissible under the general denial which remained a part of the answer. The ruling of the court on the demurrer, even if erroneous, under the circumstances would be harmless to appellant. *American Express Co. v. Southern Ind. Express Co.* (1906), *ante*, 292.

In fact it can be said that virtually the same questions in regard to the constitutional validity of the act here involved and the right of the State to recover the

2. penalty provided thereby, under the facts alleged in the complaint and found by the court in its special findings, and the conclusions of law thereon, are presented for our decision, as were involved and presented in the *Adams Express Co. v. State* (1903), 161 Ind. 328, and *American Express Co. v. Southern Ind. Express Co.*, *supra*. On the authority of these decisions the judgment below should be affirmed.

Judgment affirmed.

Montgomery, J., did not participate in this decision.

MACGINNITIE v. SILVERS.

[No. 20,847. Filed November 2, 1906.]

1. MUNICIPAL CORPORATIONS.—*Streets and Alleys.—Vacation of.—Remonstrance.—Appeal and Error.—Boards of Commissioners.*—The filing before the board of commissioners of an unverified remonstrance, by a landowner, against the vacation of the streets and alleys in a plat of land disannexed by a municipal corporation, in a proceeding under §4229 Burns 1901, Acts 1893, p. 44, providing for such vacation, sufficiently shows an interest in such remonstrant entitling him to appeal from the decision of such board. p. 323.
2. SAME.—*Streets and Alleys.—Vacation of.—Joint Remonstrance.—Appeal by One.—Boards of Commissioners.*—One of several joint remonstrants, in a proceeding to vacate the streets and alleys of a plat of land disannexed by a municipal corporation, has the right to a separate appeal from the decision therein by the board of commissioners. p. 323.
3. EASEMENTS.—*Streets and Alleys.—Property Rights.*—The right of egress and ingress is a property right belonging to the owner of a lot, and can be taken from him only by due process of law. p. 324.
4. BOARDS OF COMMISSIONERS.—*Judicial Capacity.—Vacation of Streets and Alleys.*—The board of commissioners in deciding upon a petition under §4229 Burns 1901, Acts 1893, p. 44, for the vacation of the streets and alleys in a plat of land disannexed by a municipal corporation, acts in a judicial capacity. p. 324.

From Adams Circuit Court; *Richard K. Erwin*, Judge.

Petition by Penina Silvers, against which Walter F. MacGinnitie remonstrated. From an order of the circuit court dismissing remonstrant's appeal from the board of commissioners, remonstrant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

Frank B. Jaqua and *Dore B. Erwin*, for appellant.

Smith & Moran, for appellee.

MONTGOMERY, J.—This proceeding was commenced by appellee before the Board of Commissioners of the County

of Jay, to vacate the lots, streets and alleys of a certain plat of ground which had theretofore been disannexed from the city of Portland. The proceeding was founded upon the following statute: "That the owner or owners of real estate which may or has been disannexed from any city or town in this State, according to the provisions of §3247 of the revised statutes of 1881, may have the lots, streets and alleys vacated on petitioning the board of commissioners of the county in which said city or town is situated reciting the fact of the desire of such owner or owners to have the lots, streets and alleys of such disannexed territory vacated. Notice of the filing of such petition and the substance thereof, shall be published for one week in some newspaper printed and published in such county, twenty days previous to the first day of the meeting of such board of commissioners. If the facts in such petition are found to be true, and there is no valid objection thereto by the owner or owners of real estate affected thereby, said board shall cause an order to be made upon their records, declaring the lots, streets and alleys in said disannexed territory vacated, and that such territory thereafter be described as unplatted land." Acts 1893, p. 44, §4229 Burns 1901.

Notice of the proceeding was duly given, and in response thereto appellant and others appeared and filed their objections in writing by way of remonstrance against the granting of appellee's petition. The objections were overruled, the prayer of the petition granted, and an order or judgment entered vacating the lots, streets and alleys included in the plat. Appellant appealed from this judgment to the Jay Circuit Court, and upon application the venue of the cause was transferred to the Adams Circuit Court. In the latter court the appeal was dismissed upon appellee's motion, assigning as reasons therefor: (1) That appellant had filed no affidavit of the fact that he was interested in and aggrieved by the decision of the board; (2) that the other remonstrators had not joined in the appeal; (3) that

the judgment of the board was wholly legislative and not judicial, and therefore not appealable.

The only error assigned is the dismissal of said appeal.

In the remonstrance filed before the board it was shown that appellant owned lots ten, eleven and twelve in block three of the plat of ground to be vacated, as well as

1. other lots in the same addition, and that the vacation of the streets and alleys, as prayed, would affect the means of ingress and egress to and from such property, to the great inconvenience of the owner. The publication of notice of the filing and substance of appellee's petition was to afford persons whose property rights might be affected an opportunity to appear and make objections to the proceeding. The statute quoted clearly contemplates that the *ex parte* petition shall be presented by the owner or owners of all the ground embraced in the plat to be vacated. Appellant's remonstrance disclosed a deficiency in appellee's title, and averred that appellant was the owner of a portion of the tract, and of other rights affected, and thus tendered a "valid objection" and an issue which, if established by proof, would necessarily defeat the proceeding. The appearance and filing of this remonstrance made appellant a party to the proceeding, and sufficiently made known his interest in the matter pending, and no affidavit of his interest and that he was aggrieved by the decision of the board was required. *Strebin v. Lavengood* (1904), 163 Ind. 478; *Harris v. Millege* (1898), 151 Ind. 70.

The remonstrators signed a single document in which their several interests were distinctly shown, and there can

be no question that appellant might prosecute a

2. separate appeal. It follows that the second ground of the motion to dismiss is not tenable.

Appellee's counsel contend that in proceedings of this character the board of commissioners exercises a purely

arbitrary discretion, and that its decision is final,
3. and no appeal therefrom is authorized. The means of ingress and egress, and ways appurtenant to property, constitute valuable property rights which can only be taken by due process of law. If this statute contemplated the destruction of such rights against the owner's will, and without any provision for a hearing of a judicial character upon the question of the public necessity or utility thereof, or, for the assessment and payment of resulting damages, its validity would be open to serious question. But, as already said, it is not contemplated that the board will act until petitioned so to do by the owners of all the lots involved, and when, after notice, no showing is made that the proposed vacation will injure private rights or the public convenience or that there is any valid objection to the proceeding. In the determination of these

4. matters the board acts judicially, and from its final order or judgment an appeal is authorized. Elliott, Roads and Sts. (2d ed.), §§359, 876, p. 960; *Flournoy v. City of Jeffersonville* (1861), 17 Ind. 169, 79 Am. Dec. 468; *Hanna v. Board, etc.* (1867), 29 Ind. 170; *State, ex rel., v. Board, etc.* (1874), 45 Ind. 501; *Grusenmeyer v. City of Logansport* (1881), 76 Ind. 549; *Board, etc., v. Logansport, etc., Gravel Road Co.* (1882), 88 Ind. 199.

The court erred in dismissing appellant's appeal, and the judgment is reversed, with directions to overrule appellee's motion to dismiss, and for further proceedings not inconsistent with this opinion.

WESTON v. THE STATE.

[No. 20,887. Filed November 2, 1906.]

1. HOMICIDE.—*Manslaughter*.—*Assault and Battery*.—*Death Resulting*.—The defendant's commission of an unlawful assault and battery upon deceased, resulting in his death, constitutes manslaughter. p. 326.

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2. **HOMICIDE.—Misadventure.—Assault and Battery.—Justifiable.**—The defendant's commission of a justifiable assault and battery upon deceased, resulting in his death, constitutes a homicide by misadventure. p. 327.
3. **TRIAL.—Instructions.—Criminal Law.—Homicide.—Self-Defense.—Actual and Apparent Dangers.**—An instruction, in a prosecution for homicide occasioned by defendant's striking deceased a blow with his fist, that defendant could "justify the attack upon deceased only on the theory that at the time he struck the deceased he, the defendant, was in imminent danger of great bodily harm or in imminent danger of losing his life at the hands of the deceased," is erroneous, since it excludes the idea of apparent danger. p. 327.
4. **CRIMINAL LAW.—Self-Defense.—Test.**—Defendant has the right to defend himself by force where, from his viewpoint, it is reasonably apparent that he will probably suffer personal injury at the hands of an aggressor. p. 328.
5. **SAME.—Self-Defense.—Character of.**—To justify self-defense by the use of the fists does not require that the reasonably apparent danger shall be so great as the danger sufficient to justify the use of a deadly weapon. p. 328.
6. **SAME.—Self-Defense.—When Right Begins.—Assault and Battery.**—Defendant, when it is reasonably apparent to him that he is assaulted, or will be immediately, but not to the degree of endangering his life, may resist by the use of such force as is reasonably calculated to protect him from such dangers. p. 328.
7. **TRIAL.—Instructions.—Curing.—Criminal Law.—Homicide.—Self-Defense.**—A positively incorrect instruction on the right of self-defense in a homicide case, is not cured by the giving of a correct instruction thereon, confusion of the jury upon a vital question probably resulting. p. 329.

From Huntington Circuit Court; *James C. Branyan*, Judge.

Prosecution by the State of Indiana against Boston Weston. From a judgment of conviction, he appeals. *Reversed.*

J. S. Branyan and *C. W. Watkins*, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

GILLET, J.—Appellant was convicted in the court below of involuntary manslaughter. There was testimony

of the following state of facts: On the evening of January 30, 1906, a party of six men went from Decatur to Huntington to attend a minstrel performance and a lodge banquet. The members of the party, or some of them at least, commenced drinking when they reached Huntington. They were quite boisterous at the performance, and various members of the party, or all of them, were drinking at the banquet, which was held afterwards. At 1 o'clock a. m. they telephoned for a hack, and appellant, who was a hack driver, came in response to the message, and drove them to the depot. Upon their alighting, an altercation occurred between them and appellant over the question as to whether he was entitled to seventy-five cents in addition to the like sum which he had already received. The upshot of the quarrel was that appellant struck one of the party, Roman J. Holthouse, with his fist, knocking him down. As the latter fell, his head struck the sidewalk, causing his death. According to the testimony of appellant, while the dispute was in progress the members of the party advanced toward him, forming a semicircle, while he retreated until he stood beside his hack. Their talk was loud and profane, and their manner threatening. Appellant testified that he merely continued to assert that he was entitled to the additional fare, when the deceased, calling him a vile name and threatening to knock his head off, stepped quickly towards him. It was in these circumstances, according to appellant, that the blow was struck, and he testified that he was frightened at the time. There was testimony on behalf of the State which tended to put the matter in a different light, but in material particulars appellant was corroborated by other witnesses.

No claim is advanced that appellant intended to kill the deceased. If appellant is guilty, it must be on the theory that in striking the blow he committed an assault

1. and battery, and that therefore the case is one in which, while he was in the commission of an unlaw-

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ful act, he killed the deceased. On the other hand, if the circumstances were such as to justify appellant in

2. striking the blow as a measure of self-defense, his act was lawful, and the killing was but a homicide by misadventure.

The trial court gave forty-eight instructions to the jury. A number of these instructions are complained of by appellant's counsel. Among them are instructions

3. seven and seventeen. The material portion of instruction seven, so far as present purposes are concerned, reads as follows: "The defendant can justify the attack upon the deceased only on the theory that at the time he struck the deceased he (defendant) was in imminent danger of great bodily harm, or in imminent danger of losing his life at the hands of the deceased." Instruction seventeen is as follows: "I instruct you, gentlemen of the jury, that the doctrine of self-defense is a humane provision of the law which gives one the right to repel force by force, when attacked, and even to take human life to avoid great bodily injury or to save one's life. In this case, if you find from the evidence that the defendant, Boston Weston, struck the deceased, Roman J. Holthouse, when he, the defendant, was in no danger of great bodily injury and in no danger of losing his life, then I instruct you, if you so find from the evidence, beyond a reasonable doubt, that the law of self-defense would be no defense for the defendant in this action." The principal objection which is offered to the above instructions is that they limit the right of self-defense to a situation of actual danger. We are of opinion that appellant has just cause to complain of said instructions, and particularly of the seventh. It will be observed that by the use of the word "only" in said instruction all claim of a justification for appellant's act was limited to a case in which he was in fact in imminent danger of losing his life or sustaining great bodily harm. While such a situation would have authorized appellant to

act in self-defense, yet his counsel properly object to the fact that the instruction denied to him the right to have the jury consider whether he honestly and reasonably believed that the danger was real. *Batten v. State* (1881), 80 Ind. 394; *Bryant v. State* (1886), 106 Ind. 549. Of course the

defendant was not entitled to claim the benefit of a

4. belief that danger existed unless the facts were such as to make his belief a reasonable one, but, in determining whether he had reasonable cause to entertain such belief, the matter must be judged from the standpoint of the man himself. As was said by the supreme court of Iowa: "The inquiry is, was the danger actual to the defendant's comprehension; not whether the danger existed in fact, not whether the injury was actually intended by the deceased, but was it evident or actual to the prisoner as compared with danger remote or problematical." *State v. Neeley* (1865), 20 Iowa 108.

We may further add concerning said instructions, although complaint is not made of that phase of them, that the court erred in the further particular of con-

5. fining the right of self-defense to a situation so grave that the danger to be averted was the loss of life or serious bodily harm. It must be remembered that appellant only made use of his fist. To justify such a method of defense, it is not required that the danger, real or apparent, should be as great as where resort is had to the use of a deadly weapon. If the deceased committed an assault upon appellant, in such manner as to bring

6. him into imminent danger of any injury, or to cause such an appearance of danger as to lead him reasonably to believe that it existed, he was not bound to stand until he received the blow, and in putting the doctrine of self-defense before the jury the right of appellant to strike a blow should not have been circumscribed to a situation in which he was in danger of death or serious bodily injury. 1 Wharton, Crim. Law (9th ed.), §628; *State v.*

Sherman (1889), 16 R. I. 631, 18 Atl. 1040; *Gallagher v. State* (1859), 3 Minn. 270. In 1 Clark & Marshall, Law of Crimes, §212, the authors state: "When a man is assaulted, but not in such a way as to endanger his life or threaten great bodily harm, he has a right to defend himself, and, in doing so, to use any necessary force short of taking his assailant's life or inflicting great bodily harm; and, unless the force employed is clearly excessive, he is not guilty of assault and battery."

It was most important to appellant, in view of the unapprehended consequence of the striking of the blow, that the precise quality of his act should have been presented to the jury under clear instructions as to the right of self-defense. The question was whether the blow which he struck was an unlawful one. If it was unlawful, and death resulted therefrom, he was at least guilty of involuntary manslaughter (*State v. Johnson* [1885], 102 Ind. 247), but if the blow was lawful, he should go acquit.

It is true that, in the course of the exceedingly long charge that the court gave to the jury, there was an instruction given, which was tendered by appellant,

7. upon the subject of his right to act upon appearances, but this was not sufficient to obviate the objection which appellant's counsel have pointed out to instructions seven and seventeen. While instructions are to be considered as a whole, yet if the defect in an instruction is so great as to cause uncertainty as to the law in the minds of the jurors, after listening to all the instructions, the cause must be reversed. *Somers v. Pumphrey* (1865), 24 Ind. 231; *Bradley v. State* (1870), 31 Ind. 492; *Kingen v. State* (1874), 45 Ind. 518; *Toledo, etc., R. Co. v. Shuckman* (1875), 50 Ind. 42; *State, ex rel., v. Sutton* (1885), 99 Ind. 300; *Clark v. State* (1902), 159 Ind. 60. We may well quote in this connection the following declaration of this court in one of the older cases: "It is true, that upon this subject a correct instruction was given at the

request of the defendant. But that did not repair the error. Contradictory instructions would, if allowed, make the trial by jury a most mischievous institution." *Clem v. State* (1869), 31 Ind. 480, 483.

Other questions are discussed by counsel for appellant, but, as it does not appear that they are likely to arise upon another trial, we shall not pass upon them.

Judgment reversed, with an order for a new trial.

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BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY v. SLAUGHTER.

[No. 20,874. Filed November 13, 1906.]

1. **NEGLIGENCE.—Bare Licensee.—Trespasser.—Safety of Premises.**—The owner is under no duty to keep his premises safe for a bare licensee or trespasser who enters such premises upon his own initiative and without any enticement, allurement or invitation of such owner. p. 334.
2. **PLEADING. — Complaint. — Farm Crossings.—Invitation.**—A complaint showing that defendant railroad company built approaches to its track apparently for a farm crossing and planked between its tracks, coupled with the fact that the farmer owning lands on both sides thereof, and his tenants, have been using such crossing, sufficiently shows an invitation for such farmer and his tenants to use same. p. 335.
3. **NEGLIGENCE.—Licensee.—Invitation.—Safety of Premises.**—The owner of premises is under a duty to exercise care for the safety and protection of a licensee who enters such owner's premises by reason of an enticement, allurement or inducement, mere acquiescence in the entry thereof being insufficient to place the owner under such duty. p. 335.
4. **EASEMENTS. — Private Ways. — Negligence.—Care Required from Owner.**—The owner of a private way, built in such manner as to constitute a quasi-dedication, or an invitation, to certain persons to use same, is liable for any injury to such persons caused by his failure to use ordinary care therein. pp. 337, 338.

 Baltimore, etc., R. Co. v. Slaughter—167 Ind. 330.

5. **WORDS AND PHRASES.**—*“Invitation.”—Inferences of.—Private Ways.—Use of.*—“Invitation,” as used in referring to a license to enter the premises of another, imports not only an actual bidding but also an allurement or enticement; and an invitation to use a way may be implied from the manner of constructing same and the continued use thereof by plaintiff. p. 337.
6. **PLEADING.**—*Complaint.—Railroads.—Farm Crossings.—Negligence.*—A complaint by the tenant of a landlord owning lands on each side of a railroad right of way, showing that the railroad company had built a private wagon road crossing over its tracks and had planked between the rails; that plaintiff had used such wagon road since its construction and that defendant negligently placed a hand-car in such road near such crossing, at which plaintiff's team became frightened, causing it to run away and to injure plaintiff, states a cause of action. p. 338.
7. **SAME.**—*Complaint.—Railroads.—Hand-Cars.—Placing in Private Way.—Frightening Horses.—Ordinary Gentleness.*—A complaint showing that defendant railroad company carelessly and negligently placed its hand-car lengthwise upon plaintiff's farm crossing and carelessly and negligently obstructed the free use of same, and that plaintiff was injured as a direct result thereof by his team's fright thereat, is sufficient, on demurrer, without a direct allegation that his team was ordinarily gentle. pp. 339, 342.
8. **SAME.**—*Negligence.—Motion to Make More Specific.*—A motion to make more specific and not a demurrer is the proper remedy where a complaint makes a general allegation of defendant's negligence and resulting injury to plaintiff. p. 340.
9. **NEGLIGENCE.**—*Proximate Cause.—Pleading.*—It is not necessary that the proximate cause of an injury should be shown to be one that always or even ordinarily produces the alleged injury; but it is sufficient if it was reasonably to be apprehended that such injury might occur to one while exercising his legal rights. p. 340.
10. **EVIDENCE.**—*Judicial Notice.—Pleading.*—Courts judicially know that horses sometimes take fright at unusual objects. p. 341.
11. **NEGLIGENCE.**—*Placing Hand-Car in Railroad Crossing Way.—Question for Jury.*—Whether a railroad company was guilty of negligence in placing a hand-car in a farm crossing way is a mixed question of law and fact and a proper question for the jury. p. 341.
12. **PLEADING.**—*Obstruction to Highway.—Character of.*—It is not necessary either to allege or prove that an obstruction to a street or highway was calculated to frighten horses, such

question being for the jury, to be determined from all the facts and circumstances. p. 341.

13. **NEGLIGENCE.—Railroads.—Placing Hand-Car in Way.—Frightening High-Spirited Horses.**—A railroad company may be liable for injuries caused by the fright of plaintiff's high-spirited horses at a hand-car, negligently placed by it upon a farm crossing way and calculated to frighten ordinarily gentle horses. p. 342.
14. **SAME.—Contributory.—Defense.—Driving High-Spirited Horses.**—Courts cannot assume that plaintiff was guilty of contributory negligence in driving a high-spirited team, such question being a matter of defense (§359a Burns 1901, Acts 1899, p. 58). p. 342.
15. **PLEADING.—Complaint.—Railroads.—Negligence.—Proximate Cause.—Frightening Horses.**—A complaint showing that a railroad company's negligence in the placing of a hand-car in a way was so far an efficient cause of the running away of plaintiff's team, that, but for such negligence, it would not so have run, is sufficient on demurrer. p. 342.
16. **RAILROADS.—Negligence.—Placing Hand-Car in Way.**—A railroad company is liable for injuries caused by its negligence in placing a hand-car, calculated to frighten ordinarily gentle horses, at the side of a farm crossing way. p. 343.
17. **MUNICIPAL CORPORATIONS.—Streets.—Obstructions Near.**—Municipal corporations may be liable for negligence in placing within the margin of its streets objects calculated to frighten ordinarily gentle horses. p. 344.
18. **TRIAL.—Evidence.—Variance.—Amendments.—Appeal and Error.**—Where the complaint shows that defendant railroad company negligently placed its hand-car in plaintiff's farm crossing way, thereby frightening his horses and causing him injury; and the proof shows that the hand-car was placed by the side of such way, the variance is technical, and the complaint will be treated as amended so as to cover such proof. p. 344.

From Clark Circuit Court; *Harry C. Montgomery*, Judge.

Action by William P. Slaughter against the Baltimore & Ohio Southwestern Railroad Company. From a judgment on a verdict for plaintiff for \$500, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed*.

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Edward Barton and Charles L. Jewett, for appellant.
L. A. Douglass and H. W. Phipps, for appellee.

GILLETT, J.—According to appellee's complaint, appellant carelessly and negligently left within the traveled way of a farm crossing, and as an obstruction to the free use of the same, a hand-car, having upon it tools, tin dinner buckets, and clothing, and, as a result of the negligence charged, one of the animals—a mule—composing the team which appellee was driving along said way and across said track, became frightened at the hand-car and ran away, throwing appellee out of his wagon and injuring him. Appellant, having been defeated in the trial court, prosecutes this appeal, and by its first assignment of error draws in question the propriety of the ruling of the court below in overruling a demurrer to the complaint.

It is contended by appellant's counsel that, so far as the complaint shows, appellee was a bare licensee, and that, having availed himself of the privilege of using the crossing, he was bound to accept it as he found it; or, in other words, that appellant could not properly be charged with negligence in having the car within the way.

The allegations of the complaint concerning appellee's authority to use the crossing are as follows: "That said part of said railroad which runs through said Clark county extends from the city of New Albany to the city of North Vernon, Indiana; that at a point on said line of road, at a point about five miles northeast of said city of New Albany, Indiana, and about three hundred yards northeast of what is called and known as the "K. and L." cement mills, defendant had, before November —, 1903, constructed a private wagon-road crossing of its said railroad track at said point, and which said crossing was then and there for the use and benefit of the owners of the adjoining lands on opposite sides of said railroad track at said point, and for their tenants, and for all others who might have occasion to cross over the same in the use of said lands aforesaid;

that said crossing was on said day properly constructed by fastening planks eight feet long to the ties in said track and filling in between them with broken stone, and defendant had also constructed approaches, about thirty feet in length and not to exceed ten feet in width, by throwing up earth, in the form of embankments, and covering them with broken stone; that on said day plaintiff was a tenant of the person who owned the adjoining lands on either side of said track at said crossing, and had been for more than one year, and had on many occasions before said day used said crossing in the prosecution of his said work as tenant; that he cultivated said adjoining lands as farming lands as such tenant, and on said day was entitled, as such tenant, to use said crossing with wagons and teams in the prosecution of his said work; * * * that about 5 o'clock in the afternoon of said day said plaintiff was lawfully driving a team consisting of one mule and one horse, attached to a two-horse wagon, from one portion of his said farm to another on the opposite side of said track of defendant, and in so doing had occasion to drive over and upon said crossing." In their statement of the contents of the complaint, appellant's counsel fully admit that it appears that appellee was a tenant of the adjacent farm, and that he went upon the crossing in the prosecution of his farm work.

It is doubtless the rule that a bare licensee who goes upon the premises of another for some purpose with which the owner or occupant has no concern, and without

1. any enticement, allurement, or inducement being held out to him by the owner or occupant, assumes the perils arising from defects existing in the premises. Within this class of cases are *Lingenfelter v. Baltimore, etc., R. Co.* (1900), 154 Ind. 49, and *Cannon v. Cleveland, etc., R. Co.* (1902), 157 Ind. 682.

Putting aside all questions as to the effect of the act of April 8, 1885 (Acts 1885, p. 148, §5320 *et seq.* Burns

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1901), we are nevertheless of opinion that the facts charged do not make out a case in which appellee's entry upon the railroad was simply not opposed and prevented. While it is true that it does not appear that the intent of the company in respect to the construction and maintenance of the crossing was ever communicated to anyone, or that appellee acted upon the assumption that the crossing was designed for his use, yet, taking the subjective intent in respect to the purpose of its construction and maintenance, coupled with the fact that the planking of the space between the rails and the building of the long approaches on either side tended to show objectively what the intent was, and adding to this the frequent prior user of the way by appellee, and we have a case wherein it appears to us that it would be contrary to good morals to permit appellant in effect to shift its ground, after the injury and after it had been haled into court, by asserting that appellee had ventured upon the crossing without invitation and at his own risk. Not to refine too much, it seems to us not unreasonable that the company should be subjected in the circumstances to the consequences of having extended an invitation which had been acted on.

In *Indiana, etc., R. Co. v. Barnhart* (1888), 115 Ind. 399, this court said: "When a person has a license to go

upon the grounds or the enclosure of another, he takes the premises as he finds them, and accepts whatever perils he incurs in the use of such license. But when the owner or occupant, by enticement, allurement, or inducement, whether express or implied, causes another to come upon his lands, he then assumes the obligation of providing for the safety and protection of the person so coming, and for any breach of duty in that respect such owner or occupant becomes liable for any injury which may result to the person so caused to come onto his lands. The enticement, allurement, or inducement, as

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the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's land by another is not sufficient. Such an implied invitation may be inferred from some act or line of conduct, or from some designation or dedication. This general doctrine was affirmed in the case of *Evansville, etc., R. Co. v. Griffin* [1885], 100 Ind. 221, 50 Am. Rep. 783, and is well supported by a long line of authorities. *Sweeney v. Old Colony, etc., Railroad* [1866], 10 Allen 368, 87 Am. Dec. 644; *Smith v. London, etc., Docks Co.* [1868], L. R. 3 C. P. 326; *Carleton v. Franconia Iron, etc., Co.* [1868], 99 Mass. 216; *Toledo, etc., R. Co. v. Grush* [1873], 67 Ill. 262, 16 Am. Rep. 618; *Doss v. Missouri, etc., R. Co.* [1875], 59 Mo. 27, 21 Am. Rep. 371; *Elliott v. Pray* [1866], 10 Allen 378, 87 Am. Dec. 653; *Stratton v. Staples* [1871], 59 Me. 94; *Railroad Co. v. Hanning* [1872], 15 Wall. 649, 21 L. Ed. 220; *Bennett v. Louisville, etc., R. Co.* [1881], 102 U. S. 577, 26 L. Ed. 235; *Hayes v. Michigan Cent. R. Co.* [1884], 18 Reporter 193. See *Lary v. Cleveland, etc., R. Co.* [1881], 78 Ind. 323, 41 Am. Rep. 572; *Pittsburgh, etc., R. Co. v. Bingham* [1876], 29 Ohio St. 364; *Jeffersonville, etc., R. Co. v. Goldsmith* [1874], 47 Ind. 43; *Hargreaves v. Deacon* [1872], 25 Mich. 1; *Nicholson v. Erie R. Co.* [1870], 41 N. Y. 525; *Durham v. Musselman* [1827], 2 Blackf. 96, 18 Am. Dec. 133; *Hounsell v. Smyth* [1860], 97 Eng. C. L. 731; *Gillis v. Pennsylvania R. Co.* [1868], 59 Pa. St. 129, 98 Am. Dec. 317; *Southcote v. Stanley* [1856], 1 H. & N. 247; *Bolch v. Smith* [1862], 7 H. & N. 736; *Lygo v. Newbold* [1854], 24 Eng. L. & Eq. 507; *Burdick v. Cheadle* [1875], 26 Ohio St. 393, 20 Am. Rep. 767; *Hardcastle v. South Yorkshire R., etc., Co.* [1859], 4 H. & N. 67."

The case as pleaded contains some of the elements of a dedication, and while we would not be understood as ap-

plying that doctrine to a private use, yet the consideration is not without value in determining whether it is just to hold that appellee occupied no higher plane of right, as respects negligence, than a mere trespasser. In *Bennett v. Louisville, etc., R. Co., supra*, we find the court observing: "The deceased, when injured, was using the premises for some of the very purposes for which they had been appropriated, and to which they had, so to speak, been dedicated by the owner." An essentially similar observation is to be found in *Indiana, etc., R. Co. v. Barnhart, supra*. But the word "invitation," to which

the cases on the subject under consideration so often refer, includes, both in its lexicographical and its legal sense, not only an actual bidding, but also an allurements or enticement. While an invitation may not, at least in most circumstances, grow out of mere passivity as respects the condition of the premises, yet the cases abundantly justify the assertion that where an owner constructs a way over his premises in such a manner as apparently to be for the use of certain persons, with the intent that they should use it, and they continue to enjoy it for a considerable period of time, he owes to them a duty to exercise ordinary care for their safety while pursuing the privilege, so far as his own acts are concerned, and this is especially true as to a new and unapprehended danger.

In *Corby v. Hill* (1858), 4 C. B. (N. S.) 556, 562, the plaintiff was injured while driving along a private road, extending from a turnpike to a lunatic asylum, owing to the presence of a quantity of slate which the defendant had deposited upon the way. The latter attempted to justify under the permission of the owners of the soil. Cockburn, C. J., said: "The proprietors of the soil held out an allurements whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. * * * Having, so to speak,

dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent for them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their license or permission." In the same case, Williams, J., said: "I see no reason why the plaintiff should not have a remedy against such wrongdoer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it." Willes, J., remarked: "The defendant had no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury." It is our conclusion that the facts pleaded show that appellee was more

6. than a bare licensee, and that he was entitled to complain of the negligence charged.

Thus far we have dealt with a question, owing to the generality of the points made, which it was perhaps not the intention of counsel for appellant to raise.

4. While they assert that appellee was a bare licensee, to whom appellant was not liable for its negligence, yet their whole ground for this assertion, so far as anything definitive in their brief is concerned, is based on the statement in *Bennett v. Louisville, etc., R. Co., supra*, to the effect that it is stated in Campbell, Negligence, §33, that "the principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it." But even in the

case of *Bennett v. Louisville, etc., R. Co., supra*, the court states that no definite rule can be laid down, and the whole trend of the opinion is against the position of counsel. In the absence of further proof of the circumstances of the party's entry than that it was for his pleasure or benefit, there may be a presumption that he was a bare licensee, but the view is utterly wrong that this fact forms the basis of a controlling principle. In the leading case of *Sweeny v. Old Colony, etc., Railroad* (1866), 10 Allen 368, 87 Am. Dec. 644, the company was held liable for the negligence of its flagman in signaling that the way was clear at a crossing which belonged to the railroad but which it had permitted the public to use for the purposes of travel. It was argued on behalf of the company that to hold it liable would involve the anomaly of charging it with a failure to guard a place which it was not bound to keep open, but Bigelow, C. J., said: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action, on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence." And so we find it stated by Judge Cooley, that if one "expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." Cooley, Torts (2d ed.), 605.

The next objection which appellant's counsel urge against the complaint is that it fails to aver that the hand-car and articles thereon were calculated to

7. frighten horses of ordinary gentleness. There is no doubt that this is an essential element in the case, but it does not follow that it must be specifically al-

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leged. It is charged that the defendant carelessly and negligently placed said hand-car lengthwise upon the crossing, and carelessly and negligently obstructed the free use of the same by said hand-car, and also that the accident and injuries set forth were caused by, and were the direct result of, the negligence charged. We are of opinion that it was not necessary to plead more specifically as to the nature of the defect. It is a general rule, both in this State and elsewhere, that in complaints or declarations for negligence it is competent, after showing the existence of a duty by appropriate allegations, to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that that duty was violated. If the pleading is not sufficiently specific, the remedy is by motion;

8. it cannot be taken advantage of by demurrer.

Brookville, etc., Turnpike Co. v. Pumphrey (1877), 59 Ind. 78, 26 Am. Rep. 76; *Ohio, etc., R. Co. v. Collarn* (1881), 73 Ind. 261, 38 Am. Rep. 134; *Louisville, etc., R. Co. v. Krimming* (1882), 87 Ind. 351; *Cleveland, etc., R. Co. v. Wynant* (1885), 100 Ind. 160; *Cincinnati, etc., R. Co. v. Gaines* (1886), 104 Ind. 526, 54 Am. Rep. 334; *Town of Rushville v. Adams* (1886), 107 Ind. 475; *Pittsburgh, etc., R. Co. v. Kitley* (1889), 118 Ind. 152; *Cleveland, etc., R. Co. v. Wynant* (1889), 119 Ind. 539; *Rodgers v. Baltimore, etc., R. Co.* (1898), 150 Ind. 397, and cases cited; *Lake Erie, etc., R. Co. v. McFall* (1905), 165 Ind. 574; note to *King v. Oregon, etc., R. Co.* (1898), 59 L. R. A. 209.

It is not necessary, in order to justify the submission of the question of negligence to a trial, that it should appear that the effect of the act or omission com-

9. plained of as negligent would in all cases, or even ordinarily, be to produce the consequences which followed. It is sufficient to present a trial question if it was to be reasonably apprehended that such an injury might thereby occur to another while exercising his legal

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right in an ordinarily careful manner. *Ohio, etc., R. Co. v. Trowbridge* (1890), 126 Ind. 391. It is not an un-

common thing, as the courts judicially know, for

10. horses to be frightened at unusual objects. *Billman v. Indianapolis, etc., R. Co.* (1881), 76 Ind. 166; *Wharton, Negligence* (2d ed.), §107. Whether the act of placing the hand-car within the limits of the crossing was so calculated to frighten horses which might

11. pass along the way as to render it negligent to do such an act, was a mixed question of law and fact, and it was presented by the issue formed upon the allegation that the act was negligently done. In *Cleveland, etc., R. Co. v. Wynant* (1887), 114 Ind. 525, 5 Am. St. 644, Mitchell, C. J., said: "All horses are disposed to scare or shy at objects of an unusual character in a highway. Roads are prepared with reference to this generally known disposition, and persons who place or leave objects in a highway are likewise charged with notice of this habit. These are things which every adult person of ordinary experience must be presumed to know. It is not, therefore, a subject

to be pleaded and proved, whether a box-car, or any

12. other particular object, is naturally calculated to frighten horses. This is to be determined by the experience, observation, and intelligence of the court and jury as applied to all the facts of the particular case before them." But without further discussion of the objection stated we content ourselves with the statement that in several cases this court has treated as unnecessary the averment that the object complained of was calculated to frighten horses of ordinary gentleness. *Brookville, etc., Turnpike Co. v. Pumphrey, supra; Cincinnati, etc., R. Co. v. Gaines, supra; Town of Rushville v. Adams, supra; Pittsburgh, etc., R. Co. v. Kitley, supra; Rodgers v. Baltimore, etc., R. Co., supra.*

The further objection is made to the complaint that it fails to aver that appellee's mule was an animal of ordinary

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gentleness. The allegation which the complaint
7. contains is that the mule was "well broken and not fractious or balky." If this be not an equivalent allegation, we are nevertheless of opinion that the general charges in respect to negligence rendered the complaint good on demurrer. Conceding, as we do, that there is no liability where the object which occasioned the mis-
13. chief was not naturally calculated to frighten horses of ordinary gentleness, yet it by no means follows that the owner of a high-spirited horse is remediless for an injury occasioned by its running away, owing to its being frightened by an object naturally calculated to frighten horses of ordinary docility. In view of the statute (§359a Burns 1901, Acts 1899, p. 58), we cannot assume
14. that appellee was guilty of contributory negligence in driving the animal in question, and with this element subtracted from the case as presented by the complaint, appellee appears to be entitled to recover on the facts admitted by the demurrer, as it is averred in the complaint that appellant was negligent in the particulars stated and that such negligence was the cause of, and directly resulted in, the accident and injury. If, without the contributory fault of the driver, a horse runs away,
15. and the negligent act of another is so far an efficient cause that, but for such negligence, the horse would not have run away, it would seem on general principles that the latter would be liable for an injury thereby caused to the driver. *Grimes v. Louisville, etc., R. Co.* (1892), 3 Ind. App. 573, and cases cited. This state of facts seems, in legal effect, to be shown by the complaint before us when it is subjected to the rules of construction which govern complaints in negligence cases. It was assumed in *Town of Rushville v. Adams* (1886), 107 Ind. 475, not only that it is required that the object or obstruction should be one calculated to frighten horses of ordinary gentleness, but also that the particular horse should be of that character.

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In answer, however, to the objection that these facts did not appear from the complaint, the court in that case said: "The general averment in the complaint before us, that the injury was not caused by any negligence or carelessness on the part of the plaintiff, but was caused wholly by the negligence of the town in permitting the person to maintain and carry on the business of making candy on the street, we think, makes the complaint good as against the demurrer for want of facts." Bearing in mind the effect of the contributory-negligence statute since passed, the case from which we have just quoted appears to be an apposite precedent in support of the view—whether the character of the particular animal be an element or not—that the general charge of negligence, coupled with the averment that the injury was thereby caused, sufficiently shows that the legal rights of the complaining party have been invaded. See, also, *Keeley Brewing Co. v. Parnin* (1895), 13 Ind. App. 588. We hold that the complaint is sufficient.

Under an assignment of error based on the overruling of a motion for a new trial, appellant's counsel argue that in a number of particulars the evidence fails to sustain 16. the verdict. We have read the testimony, as set out in the bill of exceptions, and are of opinion that it cannot be said that there is an entire lack of evidence in support of any proposition which appellee was called on to maintain under the issues. The point which counsel for appellant place most stress upon under the assignment in question is that the testimony shows that the hand-car was at one side of, and not in, the way, and it is claimed that for this reason the evidence failed to sustain the theory of the complaint. There seems to be some confusion in the testimony between the way, as it was graded up, and the ordinary or traveled track. There is some testimony that the hand-car was within the way. But, if it can be said that the evidence shows that the hand-car was outside of,

although very near, the way, yet it does not follow that appellee was not entitled to recover. Where an object calculated to frighten horses is placed near, but not in, a public street, there would be a question as to the liability of the city therefor, owing to the fact that the municipality did not have control over the place where the object was located. We can perceive no reason, however, for the holding that where the title to a way and the adjoining lands is in the same person there is no liability. Even in the case of a conveyance of a way of a fixed width, it would be to permit the holder of the servient estate to derogate from his own grant to uphold him in his act of placing an object calculated to frighten horses so near the way as to impair the value of the use. The placing of the hand-car where it was, if the act was really calculated to produce the mischief complained of, impinged upon the rights of appellee, although perhaps in a lesser degree than would have been the case had there been a physical obstruction of the way.

Even in the case of a public road, a municipality

17. may be liable for placing an obstruction calculated to frighten horses within the margin thereof. *Foshay v. Town of Glen Haven* (1870), 25 Wis. 288, 3 Am. Rep. 73; *Morse v. Town of Richmond* (1868), 41 Vt. 435, 98 Am. Dec. 600. As indicated in the latter case, the right to control the whole width of the road gives rise to a corresponding duty. There are perils attending the use of farm crossings which are concomitants of the use, such as the dangers occasioned by the passing of trains and the like, but the act in question caused a wholly unnecessary peril, and one which was in nowise inherent in the use, and it was the invasion of appellee's right in this particular which really constituted the gist of his action. If it can

be said that evidence that the hand-car was placed

18. on the margin of the way does not substantially prove the allegation as laid, yet at most there was but a technical variance, which it is our duty to treat as

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if the defect had been obviated by amendment. *Farley v. Eller* (1868), 29 Ind. 322; *Reddick v. Keesling* (1891), 129 Ind. 128; *Latshaw v. State, ex rel.* (1901), 156 Ind. 194; *Hartwell Bros. v. Peck & Co.* (1904), 163 Ind. 357; *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489. This was the holding in *Bristol Hydraulic Co. v. Boyer* (1879), 67 Ind. 236, where the supposed variance was of the same character as it is contended existed in this case.

We find no error. Judgment affirmed.

SHERRICK v. THE STATE.

[No. 20,823. Filed November 16, 1906.]

167	345
171	652
171	653

1. **CRIMINAL LAW.—Indictment.—Bill of Particulars.—**Defendant, Auditor of State, indicted for embezzlement of money received and appropriated to his own use, is not entitled to a bill of particulars thereof showing from whom and on what account the different items were received. p. 348.
2. **SAME.—Bill of Particulars.—Right to.—Appeal and Error.—**Courts have the inherent right to compel the state in a criminal prosecution to furnish the defendant with a bill of particulars, where it is apparent from the peculiar nature of the facts that justice and fair dealing require it, the trial court's discretion therein being subject to review on appeal only for abuse. p. 350.
3. **SAME.—Indictment.—Bill of Particulars.—Motion to Quash.—**An indictment in this State so uncertain as to require the trial judge to grant an order to furnish defendant a bill of particulars is subject to a motion to quash. p. 350.
4. **SAME.—Public Officers.—Embezzlement.—Bill of Particulars.—**A public officer charged with the embezzlement of public funds is not entitled to a bill of particulars showing the items of such embezzled funds, since he knows thereof better than the State. p. 351.
5. **EMBEZZLEMENT.—Evidence.—Officers.—Money.—From Whom Received.—**On an indictment of the Auditor of State for embezzlement the State is not required to prove the source from which the embezzled money was received nor the fund to which it belonged, proof of its receipt, the trust and the conversion of at least a part thereof, being sufficient. p. 351.

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6. **APPEAL AND ERROR.—Briefs.—Indictment.**—Where appellant fails to point out, in his brief or oral argument, any specific defect in an indictment, and the court fails to detect any, such indictment will be held good. p. 352.
7. **STATUTES.—Construction.—Criminal Law.—Without the Letter, Within the Spirit.**—An act not within the words of a criminal statute cannot be adjudged a crime because it is within the reason or spirit of such statute; and all doubts are resolved in favor of the accused. p. 354.
8. **SAME.—To Whom Applicable.—Embezzlement.—Burden of Proof.**—The burden to prove beyond a reasonable doubt that defendant, Auditor of State, is within the statute defining embezzlement, is upon the State. p. 356.
9. **OFFICERS.—Constitutional.—Auditor of State.—Duties.**—The Auditor of State is a constitutional officer whose duties must be prescribed by statute. p. 357.
10. **SAME.—Auditor of State.—Duties.—Notice.—Insurance Fees.—Principal and Agent.**—The statutes of the State are conclusive notice to all of the duties of the Auditor of State; and insurance companies paying fees to him under §8477 Burns 1901, Acts 1891, p. 199, §67, simply constitute him their agent to pay same to the State. p. 357.
11. **SAME.—Auditor of State.—Treasurer of State.—Duties.—Insurance.—Payments to Wrong Officer.**—Under §8477 Burns 1901, Acts 1891, p. 199, §67, regulating the business, transacted within this State, of foreign insurance companies, it is the duty of such companies to pay the prescribed fees to the Treasurer of State, a payment to the Auditor of State being a mere private unofficial transaction. p. 358.
12. **SAME.—Auditor of State.—Directing Collection of Money Due State.**—Section 7634 Burns 1901, §5611 R. S. 1881, requiring the Auditor of State to “direct and superintend the collection of all the moneys due the State” does not authorize him to collect on behalf of the State the insurance taxes due from foreign insurance companies. p. 359.
13. **EMBEZZLEMENT.—Essentials.—Auditor of State.**—To convict the Auditor of State of embezzlement the State must show that he converted money belonging to the State, and that such money came into his hands according to law. p. 359.
14. **OFFICERS.—Auditor of State.—Receipt of Insurance Taxes.—Assumpsit.**—Payment of insurance taxes to the Auditor of State, under §8477 Burns 1901, Acts 1891, p. 199, §67, does not vest the title to such money in the State until a ratification is made, but such money may be recovered from such officer in an action for money had and received. p. 359.

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15. **OFFICERS.—Auditor of State.—Receipt of Insurance Taxes.—***Ratification.*—An action upon the official bond of the Auditor of State for the recovery of insurance taxes received by him, brought subsequently to the alleged conversion, cannot make such prior conversion a crime when it was not one when committed. p. 360.
16. **ESTOPPEL.—Origin.—Purpose.**—Estoppel arises from equitable principles and is designed to aid in dispensing justice, and its purpose is to preserve acquired rights and not to create new ones. p. 361.
17. **EMBEZZLEMENT.—Auditor of State.—Receipt of Insurance Taxes.—Official Capacity.—Estoppel.**—The Auditor of State, indicted for the embezzlement of insurance taxes received by him while in the discharge of his duties as such auditor, is not estopped from showing that the duty of receiving such taxes was not enjoined upon him by the law. p. 362.
18. **TRIAL.—Instructions.—Prejudicial.—Presumptions.**—An erroneous instruction applicable to every count in an indictment is presumed to be prejudicial and therefore reversible error. p. 363.

From Criminal Court of Marion County (36,188);
James E. McCullough, Special Judge.

Prosecution by the State of Indiana against David E. Sherrick. From a judgment of conviction, defendant appeals. *Reversed.*

Addison C. Harris, Dan. W. Simms and William N. Harding, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley, H. M. Dowling and W. C. Geake*, for the State.

John W. Kern, Terhune & Abney and Miller, Shirley & Miller, amici curiae.

HADLEY, J.—The indictment against appellant contained eleven counts. The fifth was for larceny, and all the others for embezzlement. He was acquitted on the fifth, and convicted on each of the other counts.

It is charged in the first count that the defendant, as Auditor of State, being then and there charged and intrusted with the collection, receipt and safe-keeping of

moneys, funds, etc., for the State, did receive for the State, moneys, funds, securities, bonds and choses in action amounting to the sum of \$1,000,000, and on June 30, 1905, feloniously converted to his own use \$120,000 thereof, and which belonged to the State, the same being a part of the money so received by him as such Auditor. The third count, after charging the official trust and the receiving, as in the first count, alleges that the defendant converted to his own use certain bills, bank checks and drafts of the value of \$120,000, the property of the State, a more particular description of which was unknown to the grand jury.

To each of these counts appellant addressed a motion to require the prosecuting attorney to furnish him with a bill of particulars showing the nature of the facts which

1. the State will seek to introduce in support of said counts, and from what source, and from whom, and on what account, the money with which he was charged with embezzling came into his possession, so that the same may be identified. The motion was overruled, and this presents the first question for our consideration. We have in this State what purports to be a complete code of criminal procedure, and in it there is no recognition of a motion for a bill of particulars. §1808 Burns 1905, Acts 1905, pp. 584, 621, §167. Under our code an indictment must contain a statement of the facts constituting the offense in plain and concise language; that is, the facts must be stated in such clear, full and certain manner as reasonably to apprise the defendant of what he is required to meet, and any failure to do this may be reached by a motion to quash. §1835 Burns 1905, Acts 1905, pp. 584, 626, §194. Certainty in the essential facts relied upon by the prosecution being thus secured, our courts, so far as we are advised, have not found it necessary to resort to bills of particulars to preserve the rights of either the State or the

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defendant, and we can conceive of no case under our criminal code where such a motion would be proper. Such a practice was wholly unknown to the ancient common law, but as time went on, under a keener sense of fairness to the defendant, it was developed in actions of debt and assumpsit. 3 Ency. Pl. and Pr., 518.

Later the practice was extended to certain criminal cases, wherein it was deemed sufficient to charge the offense in general terms, as being a common barritor, a common scold, and the like. 1 Hawkins, Pleas of the Crown (6th ed.), chap. 81, §13. At a more recent date the practice was, and has continued to be, employed by judges in this country, in jurisdictions where more general and uncertain pleading is permissible, as well as in England, in cases where they have found it necessary to prevent surprise and injustice to the defendant, to require the State to amplify and designate certain subsidiary and evidentiary facts relied upon by the prosecution, and which are not disclosed or indicated by the general language in which the offense is charged. Among the first of such cases was *Commonwealth v. Snelling* (1834), 15 Pick. 321, 331, which was a prosecution for libel, and in which Shaw, J., says: "The general rule to be extracted from these analogous cases, is, that where, in the course of a suit, from any cause, a party is placed in such a situation that justice cannot be done in the trial, without the aid of the information to be obtained by means of a specification or bill of particulars, the court, in virtue of the general authority to regulate the conduct of trials, has power to direct such information to be seasonably furnished." Such a bill was also required under an indictment charging the defendant with being a common seller of intoxicating liquors on a particular day. *Commonwealth v. Giles* (1854), 67 Mass. 466.

In Florida it was allowed in a prosecution for embezzlement on an indictment under the following statute: "It

shall be sufficient to allege generally in the indictment the embezzlement of money to a certain amount, without specifying any particulars of such embezzlement.”

In brief, it may be said that under the adjudications of a number of other states, the right to call for a bill of particulars arises, not from a statute, but from the

2. inherent power of the court, to be exercised in any case, when from the general character of the charge, or peculiar nature of the facts admissible in evidence, it becomes manifest to the trial judge that justice cannot be fully administered, or may become greatly imperiled, without the advanced information obtainable through a bill. Wharton, Crim. Pl. and Pr. (9th ed.), §702; 1 Bishop, Crim. Proc. (3d ed.), §643; *People v. Jaehne* (1886), 4 N. Y. Cr. 161; *State v. Wooley* (1887), 59 Vt. 357, 10 Atl. 84; *People v. McKinney* (1862), 10 Mich. 54; *Commonwealth v. Snelling, supra*; *Westbrook v. State* (1899), 76 Miss. 710, 25 South. 491. From the very nature of the right, the power to order or to refuse to order a bill of particulars, it is held, rests within the sound judicial discretion of the trial court, subject to review on appeal only for its abuse. *State v. Davis* (1880), 52 Vt. 376; *Thalheim v. State* (1896), 38 Fla. 169, 20 South. 938; *People v. McKinney, supra*; *Commonwealth v. Shoener* (1904), 25 Pa. Super. Ct. 526, 536; *Commonwealth v. Ryan* (1857), 75 Mass. 137; 1 Bishop, Crim. Proc. (3d ed.), §643; Wharton, Crim. Pl. and Pr. (9th ed.), §705.

It may be said, however, that under the certainty required in criminal pleading in this State, whenever a trial judge finds it necessary to the administration of

3. justice to grant a bill of particulars, he has found an ample reason for quashing the indictment for uncertainty.

For a further reason, there was no error in denying the appellant's motion for specifications or particulars. He is

charged with the conversion of moneys, bills, bank
4. checks, and drafts belonging to the State, and which
he had in his possession and under his control as
Auditor of State. So far as our information extends a
bill of particulars was never awarded a public officer as a
means of obtaining information as to how, and from whom,
and on what account, the property alleged to have been
converted came into his hands. Such requirement of the
State would amount to a practical denial of the right to
prosecute. How can the State, without opportunity, know
from whom, and on what particular account, the money
was received? A public officer engaged in collecting and
disbursing revenues of the State, and whose dealings with
the public embrace a large number of persons and a multi-
plicity of items, and who has the sole supervision of his
accounts, occupies a position very different from an agent,
clerk, or private person. The work of the latter is usually
performed under the supervision and control of the prin-
cipal, who has, or at any time may acquire, accurate knowl-
edge of names, amounts, and accounts, and thus be in a
position to respond to particulars. But the Auditor of
State, being his own master, and pursuing his own meth-
ods, is the only person who knows, and can know, the de-
tails of his office, and is therefore in no position to ask for
that information which he has, or has the opportunity to
have. *People v. McKinney, supra; State v. Munch*
(1875), 22 Minn. 67, 73.

Furthermore, it is charged in the indictment that appel-
lant as Auditor of State was charged and intrusted with
the collection, safe-keeping and disbursement of
5. money, securities, bonds, and choses in action be-
longing to the State, and as such auditor he did
receive, for the purposes aforesaid, money, securities,
bonds and choses in action, amounting to \$1,000,000, and
converted a part to his own use. The State was required
to prove the receiving, the trust and the conversion of at

least a part. It was not required to prove the source or persons from whence the money came, or the fund to which it belonged, and from which it was converted. A conversion from one fund constitutes the same crime, and carries the same punishment, as a conversion from any other fund, or from all the funds combined. Hence the information sought could have been of no value to the defendant, because the State was not required to make such proof. *Hollingsworth v. State* (1887), 111 Ind. 289; 15 Cyc. Law and Proc., 516, and the large number of cases therein collected; 3 Ency. Pl. and Pr., 529. The court did not err in overruling the appellant's motion for a bill of particulars.

Appellant has assigned error on the overruling of his motion to quash the several counts of the indictment. In his argument, however, both in his brief and orally

6. before the court, he has pointed out no specific objection to either of the counts, and after a careful examination we have failed to find any sufficient reason for holding any of them bad. We therefore pass to what appellant terms the main question. The main question resolves itself into these three: (1) Is the defendant within the class against which the penalty of the statute is denounced? (2) Are the taxes exacted by the State of foreign insurance companies, under the statutes, when solicited and received by the Auditor of State, and in his possession, the property of the State, without an affirmative act of ratification by the State? (3) Having solicited and received payment of foreign insurance taxes, as Auditor of State, will such auditor, in a prosecution by the State for such conversion, be heard to say that the money so received was not the property of the State?

The prosecution is based upon the following statute: "Whoever, being charged or in any manner intrusted with the collection, receipt, safe-keeping, transfer or disbursement of any money, funds, securities, bonds, choses in

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action or other property belonging to or under the control of the State * * * converts to his own use, * * * in any manner whatever, contrary to law, or uses by way of investment in any kind of property, or loans, either with or without interest, or deposits with any person or corporation, contrary to law, or exchanges for other funds except as allowed by law, any portion of such money, funds, securities, bonds, choses in action or other property, is guilty of embezzlement," etc. §2034 Burns 1905, Acts 1905, pp. 584, 670, §389.

The following other statute (§8477 Burns 1901, Acts 1891, p. 199, §67) is involved: "Every insurance company not organized under the laws of this State, and doing business therein, shall, in the months of January and July of each year, report to the Auditor of State under the oath of the president and secretary the gross amount of all receipts received in the State of Indiana on account of insurance premiums for the six months last preceding, ending on the last day of December and June of each year next preceding, and shall at the time of making such report pay into the treasury of the State the sum of \$3 on every \$100 of such receipts, less losses actually paid within the State, and any such insurance company failing or refusing for more than thirty days to render an accurate [account] of its premium receipts as above provided and pay the required tax thereon shall forfeit \$100 for each additional day such report and payment shall be delayed, to be recovered in an action in the name of the State of Indiana on the relation of the Auditor of State in any court of competent jurisdiction, and it shall be the duty of the Auditor of State to revoke all authority of any such defaulting company to do business within this State."

The question arises upon charge number four, given to the jury of the court's own motion. The court, after setting forth the above statute in full, proceeds: "You will observe that this section of the statute does not in terms

provide to what officer or person the taxes due the State from foreign insurance companies shall be paid; but the section does provide that such taxes shall be paid into the treasury of the State. * * * If you should believe from the evidence in this case that the defendant directed foreign insurance companies to pay taxes due to the State from them to him, as Auditor of State, instead of to the Treasurer of State, and that he as such auditor received payment of such taxes pursuant to such direction, then the money or funds so received became in his hands the property of the State. If such moneys were, in fact, under the law properly payable to the Treasurer of State, and the auditor directed them payable to himself, whether innocently or knowingly, it was a violation of duty on his part as an officer or agent of the State, but such violation of duty would not have the effect to deprive the State of the ownership of the money or funds so coming into his hands, and he cannot, under the law, be heard to say, under such circumstances, that the money so coming into his hands is not the property of the State in either a criminal or a civil proceeding against him; and in this cause you should consider such money as the property of the State, as well as all other money or funds due the State which came into his hands under the law as Auditor of State."

First. It must be determined whether the Auditor of State is within the class against which §2034, *supra*, is directed. If he is in such class it must be found

7. that he is charged, or in some manner intrusted by law, with the collection, or with the receipt, or with the safe-keeping, or with the transfer or disbursement, of the particular moneys or funds appellant is charged with embezzling. Whatever the nature of the offense, in interpreting the law we must be guided by that humane rule evolved from centuries of judicial experience, that in criminal procedure, wherein strict construction is required, and everything excluded that is not expressly stated, we are

not permitted to extend a statute to those within the mischief, but not within the purview. In other language, an offense not within the words cannot be adjudged a crime because within the reason.

Chief Justice Marshall, in *United States v. Wiltberger* (1820), 5 Wheat. *76, *96, 5 L. Ed. 37, says: "To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those that are enumerated."

"Penal statutes are to reach no further in meaning than their words; no person is to be made subject to them by implication; and all doubts concerning their interpretation are to preponderate in favor of the accused." 1 Bishop, *Crim. Law*, §115. Quoted approvingly in *Johns v. State* (1862), 19 Ind. 421, 429, 81 Am. Dec. 408. See, also, Bishop, *Stat. Crimes* (3d ed.), §190e; McClain, *Crim. Law*, §85; 2 Hawkins, *Pleas of the Crown* (8th ed.), chap. 18, §16; *State v. Meyers* (1897), 56 Ohio St. 340, 47 N. E. 138; *Moore v. State* (1898), 53 Neb. 831, 74 N. W. 319; *State v. Bolin* (1892), 110 Mo. 209, 19 S. W. 650; *State v. Keith* (1900), 126 N. C. 1114, 36 S. E. 169; *State v. Adamson* (1888), 114 Ind. 216. As applied in suits on official bonds, see *Bowers v. Fleming* (1879), 67 Ind. 541; *State v. Flynn* (1903), 161 Ind. 554. To illustrate: A statute making a county treasurer who converts the public moneys in his custody guilty of embezzlement cannot be extended to embrace his deputy. *State v. Meyers, supra*. An officer not charged by law to collect and who has no right to the public money cannot be convicted of embezzling money received under color of his office, though he falsely represented that he was entitled, by virtue of his office, to receive it. *State v. Bolin, supra*.

The act of congress which makes it embezzlement for any person employed in the United States mint to convert any of the metals used in coinage, does not apply to a clerk employed, but whose duties had nothing to do with the metals in relation to coinage. *Commonwealth v. Hutchinson* (1848), 2 Pars. Eq. Cas. 384. Under the laws of Ohio a county auditor is not an officer charged by law with the possession or custody of money belonging to the state, and an indictment which charged the defendant, a county auditor, with converting money which belonged to the state, "which said money had then and there come into the possession and custody of the defendant by virtue of his office," was an insufficient charge of embezzlement. *State v. Newton* (1875), 26 Ohio St. 265. Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of the criminal law. *Lindsay v. Cooper* (1891), 94 Ala. 170, 11 South. 325, 16 L. R. A. 813, 33 Am. St. 105.

When penalties are denounced against a particular class, descriptions of the class, and of the defendant as coming therein, are essential elements of the crime, and

8. must be charged and proved. *Moore v. State, supra*. We have a statute which provides that whoever, being an officer, or his deputy, having the custody of any record, document, or paper, shall fraudulently secrete or destroy the same shall be guilty of a felony. To sustain a prosecution under this statute for the destruction of a paper of even minor importance it would be incumbent upon the State, not only to allege and prove, but to prove beyond a reasonable doubt, that the defendant was in the forbidden class. The law is not different in principle or application when the offense charged is of greater magnitude.

Second. Are insurance taxes, in the hands of the auditor, the State's money? To provide and to secure a faith-

ful application of the revenues of the State, a vast and complicated machinery has been brought into exercise. There are assessors, boards of review, boards of equalization, boards of county commissioners, county and state auditors, and county and state treasurers, to each of whom is assigned certain and specific duties, which are separate and distinct from the duties assigned to any other, except as to the assessment of omitted property in certain cases. Under the scheme adopted, the law contemplates the faithful coöperation of all of the several agencies as a means of avoiding a confusion of accounts, and of securing accuracy, and the benefit to be derived from a system of checks and balances, and denounces the usurpation by one of the duties allotted to another. It is manifest from the various statutes relating to the subject that it is the policy of our general system that the Auditor of State shall collect and receive no moneys for the State except fees for official services rendered by him. Rather than a receiver of public moneys under the prevailing system, his duties are akin to those of a watchman who stands at the door of the state treasury, and without whose knowledge and consent, except in a few instances, no public moneys can legally get into or out of the state treasury.

The auditor and state treasurer are constitutional officers who "shall perform such duties as may be enjoined by law." Const., Art. 6, §1. The legislature must

9. prescribe all the powers and duties the Auditor of State will be permitted to exercise. He has no duty or authority that is not conferred by statute. And such as he has are given general publicity through public laws. Everybody is bound to know the length and
10. breadth of the auditor's authority. The insurance companies, in this instance, when he solicited the money as for the payment of taxes due to the State, were bound to know that he, as Auditor of State, had no right to collect such taxes, and if they elected to pay through

him, then for that purpose the auditor was the agent of the insurance companies, and not of the State. *Hartford Fire Ins. Co. v. State* (1872), 9 Kan. 210. The power of the officers of the government to act for their principals is a matter of public law, and everyone having dealings with them is charged with the legal limitations of their agency, which can be easily ascertained by any one who examines the law. Tiedeman, Com. Paper, §136.

Section 8477 Burns 1901, Acts 1891, p. 199, §67, provides very clearly how, when, and where foreign insurance taxes shall be paid; and the method is in perfect

11. harmony with our long-established general fiscal system. All such insurance companies shall in July and January of each year report to the Auditor of State the gross amount of all premiums received in the State, and shall pay into the treasury of the State the sum of \$3 on every \$100 of such receipts. The state treasurer is chosen biennially by the people, and at public expense is provided with an office, and spacious and secure vaults for the safe-keeping of the State's money. And everybody knows that paying into the treasury of the State is not accomplished by paying to the Auditor of State. The manner of paying money into the treasury of the State is plainly pointed out by §7664 Burns 1901, §5637 R. S. 1881. By this section "every person [foreign insurance companies as well as others] making payment into the treasury of state shall furnish to the Auditor of State a description of the liability on account of which such payment is to be made [report of all premiums received]; and the Auditor of State * * * shall certify to the Treasurer of State the amount to be paid, and the fund to which it is to be paid, and shall make his draft, in favor of the treasurer, upon the person making the payment, which certificate and draft shall then be presented by such person to the Treasurer of State, who shall receive such money, number, register, file, and preserve such draft and certifi-

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cate, and shall give a receipt for the amount paid, specifying the liability on account of which it is paid. And the Treasurer of State is expressly prohibited from receiving any money whatever into the state treasury, or on account of any fund thereof, except it be paid upon a draft as herein provided." Under these statutes there is no ground for saying that appellant, as Auditor of State, was charged or intrusted by law with the collection, and receipt of foreign insurance taxes; and it not being a duty "enjoined by law," if he assumed to collect them, his acts were the acts of an individual, and not of a public officer. *Bowers v. Fleming* (1879), 67 Ind. 541; *Warswick v. State* (1896), 36 Tex. Cr. 63, 65, 35 S. W. 386.

The contention that the general authority conferred upon the Auditor of State by §7634 Burns 1901, §5611

R. S. 1881, to "direct and superintend the collec-

12. tion of all the moneys due the State" was sufficient to warrant his collection and receipt of insurance taxes, cannot be sustained. The power to direct and superintend the collection cannot, in the presence of direct and positive directions to the contrary, be held to include the power personally to collect and receive.

To constitute embezzlement, under §2034, *supra*, two things must concur. It must be shown that the money converted was the property of the State, and that

13. it came into the possession of the accused according to the law. *Brady v. State* (1886), 21 Tex. App. 659, 1 S. W. 462; *State v. Johnson* (1878), 49 Iowa 141; *State v. Cooper* (1897), 102 Iowa 146, 71 N. W. 197.

We have seen that the money alleged to have been converted could not have reached the hands of the appellant, as Auditor of State, according to law. Hence it

14. did not go into his hands with the authority of the State; and if he did not receive it with the authority of the State, it did not become in his hands the prop-

erty of the State without some act amounting to an acceptance or ratification by the State. McClain, Crim. Law, §648. If the insurance companies paid the money to the accused as their agent, or delivered it to him as the voluntary and assumed agent of the State, to be by him paid into the treasury of the State, until the money was paid into the treasury of the State, or there was some notice of acceptance or ratification of the agency by the State, it was competent for the insurance companies to revoke the agency and recover their money from the accused, as for money had and received. *Johnson v. Central Trust Co.* (1903), 159 Ind. 605; *Sheaf v. Dodge* (1903), 161 Ind. 270.

The only claim to a ratification by the State is in the institution of an action upon the official bond of appellant

to recover the money. But this action was subsequent to the alleged conversion, and could not, when brought, make that act a crime which was not a crime when consummated. Crimes are not created by construction or ratification. 12 Harvard Law Rev., note, p. 56; *Moore v. State* (1898), 53 Neb. 831, 74 N. W. 319. Whether such action, if timely brought, would amount to such ratification as would sustain a recovery on the bond, or whether the matter of ratification in such cases rests wholly with the legislature, are matters not necessary to decide, and upon which we intimate no opinion. These considerations lead us to the conclusion that appellant, as Auditor of State, was not charged or intrusted with the collection or the receipt of foreign insurance taxes, and having wrongfully collected them, under the facts in this case, in his hands they were the money of the paying companies, and not the money of the State, nor the subject of embezzlement, as the property of the State.

Third. Is appellant estopped in any element of his defense? The Attorney-General, with great earnestness, argues that appellant, having employed his official name in

soliciting and receiving payment of the insurance taxes, will not be heard to say, under such circumstances, that the money so coming into his hands is not the State's money. In 2 Bishop, Crim. Law (8th ed.), §364, is propounded the following interrogatory: "But why should not the rule of estoppel, known throughout the entire civil department of our jurisprudence, apply equally in the criminal?" He does not assert that the law sanctions estoppels in criminal procedure, and admits that the doctrine is not fully in accord with the adjudications. Some cases, in other jurisdictions, chiefly following the suggestion and argument of Mr. Bishop, are to be found, which in tone appear to support the view insisted upon by the State. But none that has been brought to our attention goes to the limits contended for in this case. The cases cited by the Attorney-General are generally those based on the delinquencies of private agents, clerks, and servants, and embrace the element of broken confidence and want of knowledge of the agent's authority, or cases where the money had reached its ultimate destination, so that the payment was in fact a payment to the principal. The doctrine of estoppel is so novel in criminal procedure, and so inconsistent with the fundamental principles of the criminal law, that such celebrated authors on criminal law as Wharton and Russell, and on the law of estoppel, as Bigelow and Herman, take no notice of it whatever.

Estoppel is purely a defensive weapon, having its origin in equitable principles, and is designed to supplement or to aid the law in accomplishing justice where, with-

16. out its assistance, injustice may be done. Its purpose is to preserve rights previously acquired; not to create new ones. *Emmons v. Harding* (1904), 162 Ind. 154, 160. "Its object," says Cababe, "is to safeguard a transaction between parties, and insure its *bona fide* execution, and to prevent injustice that would otherwise be done. It cannot be used for the purpose of giving

a person an advantage which he would in no case have obtained, nor as a means of indemnifying him against a loss which he would in any case have suffered. Its use is as a shield, and not as a sword." Cababe, Estoppel, 119. The doctrines should be confined to saving harmless or making whole the party in whose favor they arise; and they should never be made an instrument of gain. *Lindsay v. Cooper* (1891), 94 Ala. 170, 11 South. 325, 16 L. R. A. 813, 33 Am. St. 105.

In the light of these principles, what facts had the State to rely upon for conviction at the commencement of this prosecution? The State had lost no money by ap-

17. pellant; it had not been deceived nor misled by his conduct or representations. Without some new right, some new advantage, that it did not possess when the prosecution was begun, its case must fail. The Attorney-General argues that, granting the defendant did collect of the insurance companies, without the authority of the law, he did so claiming as Auditor of State the right to collect, and that he should not now, in a prosecution for the offense, be heard to say that he had no right to collect.

The argument followed to its logical conclusion comes to this: The State as the injured party is not entitled to maintain this prosecution, because the money alleged to have been converted was the money of the insurance companies. However, to secure his punishment, the State has the right to invoke the interposition of estoppel to exclude proof of a fact that would establish the defendant's innocence of the particular crime for which he is being tried. Surely it may be said that when an act is criminal only when done by a certain class, a defendant on trial for the crime is not estopped from denying that he belongs to the forbidden class. *Moore v. State, supra*; *Bailey v. State* (1899), 57 Neb. 706, 77 N. W. 654.

The constitution of Nebraska requires that all fees for services performed by the auditor of state shall be payable

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in advance, not to the auditor, but into the state treasury. The auditor of state collected a large amount of fees for services rendered insurance companies, and converted them to his own use. He was charged with embezzling the state's money, under a statute like ours in all material respects, and which begins: "If any officer or person, charged with the collection, receipt, safe-keeping, transfer or disbursement of the public moneys, or any part thereof, belonging to the state," etc. There was a conviction, and on appeal it was held: (1) That when a penal statute is made to apply only to a certain class of persons, a description of the class is so far descriptive of the offense, and that the person charged is within the class, is a substantive element of the crime itself. (2) The statute relating to embezzlement of public moneys applies only to officers or persons charged by law with the collection, receipt, safe-keeping, or disbursement of public moneys. (3) The auditor is not, as such officer, charged with the collection, receipt, etc., of any part of the public moneys, and is therefore not within the descriptive terms of the statute. (4) An offense not within the words cannot be adjudged a crime because within the reason or spirit, and this principle cannot be evaded by holding that one performing acts which are denounced as a crime when committed by a certain class of people is estopped from denying that he is within that class. *Moore v. State, supra*.

The ninth count of the indictment is based on a certificate of deposit issued by the Farmers & Merchants National Bank of Cicero to David E. Sherrick, dated 18. February 11, 1905, for \$7,765.48. There is some evidence going to show that \$3,713.04 of the amount was composed of insurance fees belonging to the State, rightfully collected by the defendant for official services rendered, and the balance of said certificate, to wit, \$4,052.44, consisted of insurance taxes. It is argued by the Attorney-General that the conviction on this count

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should stand for a conversion of the insurance fees. But in the instruction complained of the court defined erroneously the legal status in the hands of the defendant as Auditor of State of the insurance taxes collected by him, and this instruction related to evidence in support of each count of the indictment upon which the defendant was convicted, and we must presume that it was prejudicial to him under each count.

The judgment is therefore reversed, with instructions to grant appellant a new trial.

SCHMOE ET AL. v. COTTON, ADMINISTRATRIX.

[No. 20,868. Filed November 16, 1906.]

1. APPEAL AND ERROR.—*Briefs*.—Alleged errors on appeal, not mentioned by appellant in his statement of "points" in his brief, are waived and cannot be raised afterwards. p. 366.
2. PLEADING.—*Complaint*.—*Damages*.—*Lateral Support*.—A complaint alleging that defendant owned lands contiguous to those of plaintiff; that defendant excavated his land up to the line between their lands, and that because thereof plaintiff's lands fell in, causing her damage, is sufficient. p. 366.
3. DAMAGES.—*Lateral Support*.—*Negligence*.—*Contributory*.—Negligence and contributory negligence are not factors in an action for damages for depriving plaintiff's land of lateral support. p. 367.
4. REAL PROPERTY.—*Lateral Support*.—*Buildings*.—*Negligence*.—Defendant is absolutely liable for damages to plaintiff's land in its natural condition caused by removing its lateral support, but is liable only on the ground of negligence in causing plaintiff's building to fall because of removal of the lateral support. p. 368.
5. APPEAL AND ERROR.—*Record*.—*What are Parts of*.—*Statutes*.—Under §641c Burns 1905, Acts 1903, p. 338, §3, the supplemental complaint, the action of the court in permitting its filing, and the objection and exception, are parts of the record without a bill of exceptions. p. 368.
6. PLEADING.—*Supplemental Complaint*.—*Right to File*.—*Discretion of Court*.—The right to permit the filing of a supplemental complaint lies in the sound discretion of the court. p. 368.

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7. **PLEADING.—Supplemental Complaint.—Ground for Filing.**—Permission should be given for filing a supplemental complaint where it will avoid the bringing of another action. p. 369.
8. **SAME.—Supplemental Complaint.—Lateral Support.—Continuance of Wrong After Action Filed.**—Where defendant continued to remove plaintiff's lateral support after action brought, the granting of plaintiff's request for permission to file a supplemental complaint therefor, is not error. p. 369.
9. **DAMAGES.—Measure of.—Lateral Support.**—The measure of damages for the withdrawal of the lateral support to the plaintiff's land is the difference in the value of plaintiff's land by reason of such injury. p. 369.
10. **EVIDENCE.—Damages.—Value of Land Before and After Injury.—Opinions.**—The opinion of a witness as to the value of lands before and after the injuries thereto is competent in an action for damages caused by the withdrawal of lateral support. p. 369.
11. **APPEAL AND ERROR.—Evidence.—Opinions.—Damages.**—A judgment should not be reversed merely because some of the witnesses gave an opinion as to plaintiff's damage instead of stating the value of the land before and after the injury. p. 370.
12. **SAME.—Supplemental Complaint.—Failure to Prove.—Effect.**—The plaintiff's failure to prove the allegations of his supplemental complaint does not constitute a reversible error, where the judgment is right on the original complaint. p. 370.
13. **EVIDENCE.—Ambiguous.—Exclusion of.**—It is not error to refuse to permit a witness to answer an ambiguous, uncertain and indefinite question, especially where the witness had already testified to the substance of the facts sought to be shown. p. 370.
14. **LIMITATION OF ACTIONS.—Damages.—Lateral Support.—When Right of Action Accrues.**—A right of action accrues for damages for withdrawal of lateral support, when plaintiff's land suffers the injury, and not when the support is removed. p. 371.

From Superior Court of Marion County (65,622);
James M. Leathers, Judge.

Action by Ellen M. Cotton against Louis C. Schmoe and another. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed*.

John P. Lyendecker, for appellants.

Charles E. Cox, for appellee.

MONKS, J.—This action was brought by appellee's decedent to recover damages for injury to her land caused by the excavation by appellants of adjoining land.

Appellants' separate demurrers to the complaint were overruled and a general denial filed. It appeared from the testimony of the first witness for the appellee that the alleged wrongful acts of appellants had continued after the filing of the complaint, and appellee, by leave of court, filed a supplemental complaint. The cause was tried by the court, and, over a motion for a new trial by appellants, judgment was rendered against them.

The errors assigned, and not waived by a failure to state the same in the points set forth in their brief as required by the fifth clause of rule twenty-two, are: (1) The complaint is insufficient; (2) permitting appellee to file a supplemental complaint; (3) overruling appellants' motion for a new trial in this: (a) That the evidence was not sufficient to sustain the finding of the court; (b) that the court erred in sustaining the objection of appellee to a question on cross-examination of the witness Spahr.

Under said clause five of rule twenty-two no alleged error or point not contained in appellants' statement of points can be raised afterwards, and such error or point

1. will be considered as waived. *Ewbank's Manual*, pp. 271, 283; *Elliott, App. Proc.*, §444.

Appellants insist that the complaint was not sufficient to withstand their demurrers for want of facts because the value of the land before and after the injury was

2. not stated, citing *Morgan v. Lake Shore, etc., R. Co.* (1892), 130 Ind. 101. It is said in that case, that the complaint is not good "because the value of the land is not given nor the extent of the injury stated." The complaint alleged ownership of the land by the plaintiff and

that defendants are and have been the owners of land contiguous and adjoining plaintiff's land since 1902; that "there runs through said lands of the plaintiff and defendants a high ridge or elevation, * * * composed of sand and gravel, with a thin covering of soil; * * * that said sand and gravel in said ridge extend from near the top of said ridge downward a great depth, and said ridge is and has long been entitled to the support of defendants' contiguous ground; that * * * defendants began excavating and removing sand and gravel from said ridge on their land, and continued so to do until * * * June, 1903, when they excavated said sand and gravel from said ridge to a depth of thirty feet up to and flush with the line dividing plaintiff's and defendants' lands; * * * that plaintiff's property has been greatly damaged by said excavations, in this, that plaintiff's said ridge on the west side thereof has been undermined, and, together with the fence, roadway, and fruit-bearing plants thereon, has fallen onto defendants' said ground, to plaintiff's damage in the sum of \$500." The supplemental complaint alleged "a continuance of such excavation, and the removal of earth, sand, and gravel, and the undermining of said ridge along the line dividing the lands of plaintiff and defendants, to a depth of thirty feet, and that plaintiff's land for a distance of 175 feet has broken loose, fallen, and slipped onto defendants' said ground, greatly decreasing the value of plaintiff's land, and thereby causing her damage in the sum of \$1,000." It is evident that appellants' first objection to the complaint is not tenable.

It is next asserted by appellants that the complaint seeks to charge the defendants with negligently doing an act or acts which they or either of them might rightfully

3. have done in a careful manner, and that the same is not sufficient because the absence of contributory negligence on the part of the plaintiff is not alleged. Plaintiff, as owner of said real estate, had a natural right of lat-

eral support for her land from the adjoining land owned by the defendants. This right existed independently of grant or prescription, and was also an absolute right. If defendants excavated their land adjoining the land of the plaintiff, and in consequence thereof plaintiff's land sank and fell away, as alleged in the complaint, plaintiff has a right of action, although such excavation was carefully and skillfully made.

Such right of action is not based upon negligence, but on the violation of an absolute right, the right to lateral support for said land in its natural condition; but there

4. can be no recovery of damages to artificial structures erected thereon except upon the basis of negligence. *Moellering v. Evans* (1889), 121 Ind. 195, 198-200, 6 L. R. A. 449, and authorities cited; *Schultz v. Bower* (1894), 57 Minn. 493, 59 N. W. 631, 47 Am. St. 630, note, p. 632; note to *Larson v. Metropolitan St. R. Co.* (1892), 33 Am. St. 439, 446-451, 453-455, 468-475; *Gilmore v. Driscoll* (1877), 122 Mass. 199, 23 Am. Rep. 312; 18 Am. and Eng. Ency. Law (2d ed.), 542, 547, 548; 1 Cyc. Law and Proc., 776-782; 4 Sutherland, Damages (3d ed.), §1053; 2 Washburn, Real Prop. (6th ed.), §1296. It is clear that the objections urged to this complaint are not tenable.

Under section three of the act of 1903 (Acts 1903, p. 338, §641c Burns 1905) the supplemental complaint, the action of the court in permitting the same to be filed,

5. and the objection and exception of appellants to such action of the court, are a part of the record without a bill of exceptions. The right to file a supplemental complaint rests in the sound discretion of

6. the court. *Pouder v. Tate* (1892), 132 Ind. 327, 329, 330, and cases cited; *Kimble v. Seal* (1883), 92 Ind. 276, 279-283; Woollen, Trial Proc., §§3339, 3340; 1 Works' Practice, §706; 21 Ency. Pl. and Pr., 58-63.

A consideration in favor of granting leave to file a supplemental complaint is that the law does not favor a multiplicity of suits, and that where all matters in

7. controversy may be fairly ended in one action this should be done. *Richwine v. Presbyterian Church* (1893), 135 Ind. 80; 21 Ency. Pl. and Pr., 63.

Said supplemental complaint did not change or attempt to change the theory of the cause set forth in the complaint as claimed by appellants, but merely alleged a con-

8. tinuance of the wrongs alleged in the complaint.

The court did not err in permitting the same to be filed.

The grounds upon which the appellants claim that the evidence was not sufficient to sustain the findings are: (1) That the plaintiff's witnesses testified as to the amount of damages to her land, when this was the question for the court to decide; (2) there was no competent evidence that her land had depreciated in value in consequence of the wrongful acts complained of.

The measure of appellee's damages was the diminution in value of said land, if any, in consequence of the alleged acts of appellants; that is, "the difference in the

9. value of said land by reason of said injury." *Moellering v. Evans, supra*; *Schultz v. Bower, supra*; 4 *Sutherland, Damages* (3d ed.), §1017, p. 2973; 18 *Am. and Eng. Ency. Law* (2d ed.), 543, 544; 1 *Cyc. Law and Proc.*, 785.

Under this rule it was proper for the witnesses who were properly qualified to give their opinion of the value of said land before and after the injury complained of.

10. *Moellering v. Evans, supra*; *Yost v. Conroy* (1884), 92 Ind. 464, 47 *Am. Rep.* 156; *Chicago, etc., R. Co. v. Wysor Land Co.* (1904), 163 Ind. 288, 290-292.

But a judgment should not be reversed merely because a part or all of the witnesses have stated the damages, in-

stead of the value, where the damages depend wholly

11. on the value before and after the injury. *Union Elevator Co. v. Kansas City, etc., R. Co.* (1896), 135 Mo. 353; Elliott, Roads and Sts. (2d ed.), §258, p. 274, note 2; 2 Elliott, Evidence, §1098, p. 374, note 11; 3 Wigmore, Evidence, §§1921, 1942, 1943.

Even if there was no evidence of the continuance of said wrongful acts after the commencement of the action, as alleged in the supplemental complaint, the finding

12. and judgment of the court could not be disturbed for that reason. There was evidence, however, of the continuance of the wrongs alleged in the complaint after the filing thereof, and this was the reason for filing the supplemental complaint.

On cross-examination of a witness for appellee counsel for appellants asked the following question: "Supposing the excavation would be made there in the gravel

13. pit, remaining two or three yards from Mrs. Cotton's land, and would be made there at that time, and it was in that condition, would it have any effect upon the value of Mrs. Cotton's land?" The court sustained appellee's objection to the question, and refused to permit the same to be answered. This action of the court was assigned as a cause for a new trial, and is urged as a ground for reversal in this court. Said question is so ambiguous, uncertain, and indefinite that the court was fully justified in not permitting the same to be answered. Moreover, said witness had already testified on cross-examination "that if there had been no falling away of plaintiff's land on account of said excavation, and if it was in such a condition that there would be no falling away in the future on that account, it would not, in his opinion, decrease the value of plaintiff's land."

The falling away of the land need not be immediate if the same is caused by the excavation of the adjoining land.

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The right of action accrues when the injury actually results, and not when the support is removed.

The actionable wrong is not the excavation, but the act of allowing the other's land to fall. 18 Am. and Eng. Ency. Law (2d ed.), 543, 544; 1 Cyc. Law and Proc., 783; *Smith v. City of Seattle* (1898), 18 Wash. 484, 51 Pac. 1057, 63 Am. St. 910; *Backhouse v. Bonomi* (1861), 9 H. L. Cas. *503; *Schultz v. Bower*, *supra*.

Finding no available error, the judgment is affirmed.

HASPER ET AL. v. WEITCAMP.

[No. 20,851. Filed November 21, 1906.]

1. **APPEAL AND ERROR.**—*Briefs.*—Alleged errors not discussed in appellants' brief on appeal are waived. p. 373.
2. **NEW TRIAL.**—*Argument of Counsel.*—*Misconduct.*—*Affidavits.*—*Appeal and Error.*—The filing of affidavits in support of a motion for a new trial on the ground of misconduct of counsel in the argument to the jury may be useful in refreshing the trial judge's memory of the facts, but such affidavits cannot be considered on appeal, and the trial judge's striking them out constitutes no error. p. 373.
3. **SAME.**—*Argument of Counsel.*—*Misconduct.*—*Objections.*—*How Raised.*—In order to present any question as to the misconduct of counsel in the argument to the jury it is necessary for the complaining party at the time of such misconduct to make a proper motion for the court to withdraw such offensive remarks from the consideration of the jury, or to set aside the submission of the cause, or to discharge the jury. p. 374.
4. **APPEAL AND ERROR.**—*Bill of Exceptions.*—*Argument of Counsel.*—*Misconduct.*—*How Brought Into Record.*—The motion based upon alleged misconduct in the argument of counsel, the action of the court thereon and the exception thereto, may be brought into the record by a bill of exceptions or possibly by an order-book entry by virtue of the act of 1903 (Acts 1903, p. 338, §2, §641b Burns 1905). p. 374.

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5. **TRIAL.—Argument of Counsel.—Misconduct.—Failure to Object.**—Failure of the complaining party to object, at the time, to offensive remarks of counsel in the argument to the jury, waives any right to object thereto afterwards. p. 374.
6. **EVIDENCE.—Mortgages.—Existence of.—Payment.—Bills and Notes.**—Where defendants, in an action on certain notes, pleaded payment, and contended, as sustaining such plea, that they had been during the time such notes existed fully able to pay same, evidence that a mortgage in a large sum covered their farm, and that a foreclosure suit was brought against them during such time, is competent. p. 375.
7. **SAME.—Objections.—Sufficiency.**—An objection, that defendants' counsel did not see how certain offered evidence was competent, is insufficient. p. 375.
8. **APPEAL AND ERROR.—Weighing Evidence.**—The Supreme Court will not weigh conflicting evidence in a case triable by jury. p. 375.

From Newton Circuit Court; *C. W. Hanley*, Judge.

Action by William Weitcamp against Rienner A. Hasper and another. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court under §1337u. Burns 1901, Acts 1901, p. 590. *Affirmed.*

John C. Trainer and *T. B. Cunningham*, for appellants.
John D. Sink and *William Darroch*, for appellee.

MONTGOMERY, J.—Appellee brought this action for the collection of four promissory notes. Appellants filed, and relied upon, an answer of payment. A trial by jury resulted in a verdict and judgment in favor of appellee.

The errors properly assigned upon appeal are: (1) The overruling of appellants' demurrer to the complaint; (2) striking out an affidavit in support of the motion for a new trial; (3) overruling appellants' motion for a new trial; (4) overruling appellants' motion in arrest of judgment.

The first and fourth of such assigned errors have not been presented or urged for consideration in any manner

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in appellants' brief, and therefore must be treated

1. as waived. *Stamets v. Mitchenor* (1906), 165 Ind. 672; *Major v. Miller* (1905), 165 Ind. 275; *O'Brien v. Knotts* (1905), 165 Ind. 308.

The trial of the cause in the court below was concluded, and a verdict returned, January 30, 1905, and on February 4, 1905, the last day of the term, appellants

2. filed their motion and reasons for a new trial, assigning as one of such reasons misconduct of appellee's counsel in argument. On the seventh day of the next succeeding term of said court, to wit, March 20, 1905, appellants' counsel, without having first asked or obtained leave of court so to do, filed an affidavit in support of this specification or ground of the motion for a new trial. Upon appellee's motion this affidavit was stricken out. The alleged improper statements of counsel in argument, and appellants' objection thereto, necessarily occurred in the presence of the court, and these facts can only be so authenticated as to enable this court to determine a question of law sought to be predicated thereon, by having them embodied in a bill of exceptions settled, signed, and filed by the presiding judge. The trial judge may in his discretion receive affidavits or other evidence to refresh or aid his recollection of the facts in settling the bill, but a party has no absolute right to file affidavits of such facts in support of his motion for a new trial, and although filed and properly brought into the record they will be disregarded upon appeal. It follows therefore that the court did not err in striking out the affidavits of appellants' counsel. *Choen v. State* (1882), 85 Ind. 209, 212; *Rudolph v. Landwerlen* (1883), 92 Ind. 34, 37; *Indianapolis, etc., Gravel Road Co. v. Christian* (1884), 93 Ind. 360, 361; *Buscher v. Scully* (1886), 107 Ind. 246, 247. In appellants' motion for a new trial complaint is made of the misconduct of appellee's counsel in argument, of the overruling of appellants' objection to each of the following questions pro-

pounded to appellant R. A. Hasper, on cross-examination, to wit: "It is pretty heavily encumbered by a mortgage, is it not?" and "You have had several lawsuits about it, have you not?" and that the verdict is not sustained by sufficient evidence, and these causes are urged upon us as grounds for a reversal of the judgment.

The alleged misconduct of counsel occurred in the presence of the court, and could not become available as a cause for a new trial unless objection was made at the

3. time, followed by a request or a motion on appellants' part that the court take such action as counsel deemed adequate to counteract the injurious effects of such wrongful acts, either by a withdrawal of the same from the consideration of the jury, or by an arrest of the trial, setting aside the submission, and discharging the jury. The trial court should have been asked, and afforded an opportunity, to correct the error, and an exception reserved to the ruling made upon such request, and a mere objection to the offensive statements presents no question for review. *Southern Ind. R. Co. v. Fine* (1904), 163 Ind. 617; *Robb v. State* (1896), 144 Ind. 569; *Reed v. State* (1895), 141 Ind. 116; *Worley v. Moore* (1884), 97 Ind. 15.

The motion based upon such alleged misconduct, the action of the court thereon, and the exception, if any, reserved, may be shown by bill of exceptions, or per-

4. haps under the existing practice act, a question which we need not and do not decide, by proper order-book entries. Acts 1903, p. 338, §2, §641b Burns 1905.

In the case before us the alleged misconduct of counsel, and appellants' objection thereto, are not shown by a bill of exceptions, nor is it shown in any manner that

5. appellants at the time addressed any motion or request to the trial court relating to the alleged misconduct of counsel in argument, or sought redress in vain for the grievances of which complaint is made. It follows that no available error appears in this connection.

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The contention of appellants was that they were abundantly able to pay the claim in suit at any time within eight years of the commencement of this action. The

6. assumption of this position suggested the first question to which objection was made—which related to appellants' farm and as actually put was: "How much mortgage is there on it?" to which appellant answered \$11,000. No objection to the question was stated except that counsel did not see how it was competent. This

7. did not amount to a valid objection. However, the relevancy and competency of the inquiry were manifest, and the court properly required appellant to answer the same.

An objection in the same language was made to the other question set out in the motion for a new trial. The court overruled it, and the appellants are in no position to complain: (1) Because the objection was insufficient in

6. itself; (2) the question was not answered, but the question "There was a foreclosure suit brought against you?" was put in its stead; (3) this question was relevant and proper for the reason above shown.

The burden of proving payment of the notes in suit rested upon appellants. The notes were apparently unpaid, and the oral evidence introduced by appellants and

8. by appellee upon this issue was conflicting and contradictory. It follows that the conclusion reached by the jury and confirmed by the trial judge is final and binding upon us.

No error being shown, the judgment is affirmed.

CITY OF HUNTINGTON v. AMISS ET AL.

[No. 20,677. Filed November 23, 1906.]

1. EMINENT DOMAIN.—*Drains.—Public Use.*—The condemnation of private property for drainage purposes constitutes a taking for a public use. p. 378.

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2. MUNICIPAL CORPORATIONS.—*Waters.—Drains.—Statutes.—Construction.*—Section 3598 Burns 1901, Acts 1891, p. 304, §1, providing that cities may construct drains as inlets or outlets into or out of any parts of such cities, when construed liberally as is required by §3603 Burns 1901, Acts 1891, p. 304, §6, gives such cities power to divert a natural watercourse. p. 378.
3. SAME.—*Drains.—Assessments.—Waters.*—A city has the power under the act of 1891 (Acts 1891, p. 304, §§3598-3606 Burns 1901) to assess the benefits and damages to property owners for the diversion of a natural watercourse changed for the purposes of the drainage of such city. p. 379.
4. DRAINS.—*Statutes.—Repeal.—Saving Clause.*—The drainage law of 1891 (Acts 1891, p. 304, §§3598-3606 Burns 1901) was repealed by the act of 1905 (Acts 1905, p. 456, §§5622-5635 Burns 1905), but pending proceedings were not affected thereby because of the saving clause therein (Acts 1905, p. 456, §14, §5635 Burns 1905). *Clemans v. Hatch*, 168 Ind. —, followed. p. 379.
5. MUNICIPAL CORPORATIONS.—*Drains.—Assessments.—Committee.—Members.—Qualifications.—Failure to Object.—Waiver.*—The failure of interested property owners to object to the members of a committee to make assessments for the drainage of a city under §3598 Burns 1901, Acts 1891, p. 304, §1, because of disqualification, before such committee made its report to the common council, is a waiver of their right to raise such objection. p. 379.
6. PLEADING.—*Demurrer.—Defective.—Overruling.—Appeal and Error.*—Reversible error cannot be predicated upon the overruling of a defective demurrer. p. 381.
7. SAME.—*Demurrer.—Defective.—Sustaining to Bad Answer.—Appeal and Error.*—Sustaining a defective demurrer to a bad pleading does not constitute reversible error. p. 381.
8. APPEAL AND ERROR.—*Pleading.—Demurrer.—Right Result.*—Where the trial court in its rulings on the pleadings reaches a right result, the judgment will not be disturbed. p. 381.

From Huntington Circuit Court; *Hiram Brownlee*, Special Judge.

Petition by the City of Huntington, against which Joseph G. Amiss and others remonstrate. From a judgment for defendants, plaintiff appeals. *Reversed.*

Spencer & Branyan and *W. A. Branyan*, for appellant.
Samuel E. Cook and *Roscoe A. Kaufman*, for appellees.

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MONKS, J.—Appellant brought this proceeding under the act of 1891 (Acts 1891, p. 304, §§3598-3606 Burns 1901) to secure an inlet and an outlet for the drainage of said city. A demurrer to the petition was filed, which set forth as grounds therefor: (1) The court has no jurisdiction of the subject-matter of said action and petition. (2) Said petition does not state facts sufficient to constitute a cause of action. A motion to “dismiss and strike out all the proceedings” was filed by James F. Bippus and Sarah Bippus, on the grounds: “(1) That there is no law providing for the construction of the drain as herein prayed for; (2) the court has no jurisdiction of the subject-matter of said action and petition.” The court sustained said demurrer to said petition, and the motion to “dismiss and strike out all of the proceedings,” and rendered final judgment against appellant.

The errors assigned call in question the action of the court in sustaining said demurrer to the petition, and the action of the court in sustaining said motion.

It appears from the petition that a stream known as “Rabbit run” runs from east to west through the south part of the city of Huntington, and empties into Little river west of the city limits. The river mentioned runs from east to west through the central part of said city. It is proposed by this proceeding to construct a drain commencing at a point east of the city limits and running in a northwesterly direction to Little river at a point within the city limits, and thereby divert the water of said Rabbit run and empty the same into said river about one and one-half miles above the present mouth of said run. This is the “inlet” mentioned in the petition. The “outlet” described commences on the western boundary of the city, near where Rabbit run crosses the same, and runs in a westerly direction to Little river, which is the “outlet” prayed for. It is alleged in the petition that the construction of said “outlet” and “inlet” is necessary effectually to drain said city.

Appellees insist that the court below had no jurisdiction of this proceeding, for the reasons (1) that the act of 1891, *supra*, did not empower said court or the common council of appellant to change or divert Rabbit run, a natural watercourse; (2) that said act gave no authority to change or divert said natural watercourse outside the city limits; (3) that said act of 1891 does not authorize the assessment of appellees' land for diverting a watercourse; (4) that said act of 1891 was repealed by section fourteen of the act of 1905 (Acts 1905, p. 456, §5635 Burns 1905), without saving pending proceedings.

Section one of said act of 1891 (§3598, *supra*) provides: "That whenever the common council of any city shall find it necessary for the successful drainage of said city to construct any drain as an inlet or as an outlet, leading into or out of said city, they shall cause a survey," etc. After all the preliminary steps required are taken, it is provided that the common council of the city may file a petition in the circuit court of the county, setting forth, among other things, "that such inlet or outlet is necessary effectually to drain said city."

It has been uniformly held by this court that the taking of private property authorized by the drainage laws of this

State was for a public and not a private use. *Pound-*

1. *stone v. Baldwin* (1896), 145 Ind. 139, 141, and cases cited; *Heick v. Voight* (1887), 110 Ind. 279, 284, 285.

It is evident that effectually to drain a city it may be necessary to divert a natural watercourse, as is proposed in this case, and thus relieve the city of the burden of

2. the water so diverted. Section six of said act of 1891 (§3603 Burns 1901) provides: "This act shall be liberally construed to promote the drainage of cities, the reclamation of wet lands, and the improvement of the public health." So construed, it is clear that a watercourse may be diverted and carried into the city limits by

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means of the "inlet," as is proposed in this case. The primary object of said act of 1891 was the drainage of cities, and for this purpose watercourses may be diverted by changing their channels so as to constitute an "inlet or outlet" for the drainage of a city. The power to

3. divert a watercourse is a mere incident of the power of drainage, and said act of 1891 gave full authority to assess benefits and damages for such diversion of a watercourse. Such a proceeding is clearly within the purview of said act, as shown by its provisions and by its title. It was said by this court in *City of Valparaiso v. Parker* (1897), 148 Ind. 379, 381, concerning said act of 1891, that it contemplates such drainage as "is and may be used for the removal of surface and storm water, the overflow of fountains, cisterns, public hydrants, water troughs, water-closets, sinks, all filth and refuse liquids, and the diversion of natural watercourses."

It is true, as claimed by appellees, that the act of 1891, *supra*, under which this proceeding was brought, was repealed by §5635, *supra*; but as the same was pend-

4. ing in the court below when the act of 1905, *supra*, took effect, we hold, upon the authority of *Clemans v. Hatch* (1907), 168 Ind. —, 78 N. E. 1065, that the same was saved from the effect of said repeal by §5635, *supra*, and may be completed under said act of 1891, the same as if said act of 1905 had not been passed. It follows that the court erred in sustaining the demurrer to the petition and the motion to "dismiss and strike out all the proceedings."

After the petition had been docketed in the court below certain appellees filed what is designated as a plea in abatement, setting up in effect that two of the committee

5. "appointed by the city to view said lands and estimate the benefits and damages in said cause were not disinterested freeholders or householders of said county," as required by said act of 1891. Appellant filed

a demurrer to said plea in abatement, which was sustained by the court. This action of the court is called in question by the cross-errors assigned by the appellees, who filed said plea in abatement.

Appellant contends that said appellees should have presented said objections to the qualifications of the members of the committee to make assessments at the earliest opportunity, and as this was not done the same was waived. *City of Valparaiso v. Parker, supra*. It was said in that case at page 383: "It is the general rule that such objections must be made at the earliest opportunity, so that the proceedings shall not be allowed to proceed to a fruitless result with accumulation of cost; and if not so made they will be deemed to be waived. *Bradley v. City of Frankfort* (1885), 99 Ind. 417, 421, and cases cited; *Mills, Eminent Domain* (2d ed.), §227, and cases cited; *Lewis, Eminent Domain*, §407."

Section 3598, *supra*, requires that before the petition is filed by the city the city shall appoint a committee of three disinterested householders or freeholders of said county to view the proposed inlet or outlet and the lands without the city to be affected thereby, and assess the benefits and damages to said lands, including the benefits to the city and the benefits to any highways affected thereby, and that the owners of said lands shall be given three days' notice of when the committee will view said inlet or outlet and said lands, and they are requested to be present with the right to be heard for or against any assessment that shall be made or proposed to be made against said lands. Appellees who filed said plea in abatement had the right to appear before said committee and object to the members of said committee on the grounds set forth in said plea in abatement, and otherwise protect their rights. They made no objection to any of the members of the committee until after the committee had reported to the common council of said city and the petition for the drainage of said city had been docketed.

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As was said in *City of Valparaiso v. Parker, supra*, where the question was the same as here: "Having failed to make said objection at the first opportunity, the same, even if tenable, was waived."

Appellees insist, however, that said demurrer should have been overruled, because the alleged demurrer did not

6. "state any ground of demurrer known to our practice, and was so defective in form as not to present any question as to the sufficiency of the plea in abatement." Appellees cite a number of cases which hold that when the demurrer states a ground of demurrer not known to our code, the demurrant has no just reason to complain if the court overrules it. These cases have no application here, because in this case the demurrer was sustained. Where the demurrer states no ground

7. of demurrer known to our code and is sustained to a pleading, there is no reversible error if the pleading is bad. *Garrett v. Bissell Chilled Plow Works* (1900), 154 Ind. 319, 321; *Goldsmith v. Chipps* (1900), 154 Ind. 28; *Hanson v. Cruse* (1900), 155 Ind. 176, 178; *State v. Indiana Board of Pharmacy* (1900), 155 Ind. 414, 415; *Wray v. Fry* (1902), 158 Ind. 92, 96. See, also, *Osburn v. State* (1905), 164 Ind. 262, 274. In *Goldsmith v. Chipps, supra*, a defective demurrer was sustained to a plea in abatement, and it was held that as the facts stated in the answer in abatement were not sufficient to abate the action, the action of the court in sustaining the same was not reversible error, although the demurrer was so defective in form that the party filing the same could not have successfully complained if it had been overruled.

A correct result having been reached by the court in sustaining the demurrer to the plea in abatement, it is not necessary for us to determine (1) whether appellant

8. should have moved to strike out the plea in abatement because filed too late instead of demurring thereto; or (2) whether objections to the competency of

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members of said committee are properly presented by a plea in abatement. *Allen v. Studebaker Bros. Mfg. Co.* (1899), 152 Ind. 406, 410; Elliott, App. Proc., §633.

Judgment reversed, with instructions to overrule the demurrer to the petition and the motion "to dismiss and strike out all the proceedings;" and for further proceedings not inconsistent with this opinion.

TINKLE v. WALLACE.

[No. 20,662. Filed November 27, 1906.]

1. **ELECTIONS.—Contest.—Township Trustee.—Bribery.—Constitutional Law.**—Under article 2, §6, of the Constitution, providing: "every person shall be disqualified for holding office, * * * who shall have given or offered a bribe, threat or reward to secure his election," and §6312 Burns 1901, §4756 R. S. 1881, providing that any election may be contested on the ground that the contestee is ineligible, the election of a township trustee may be contested because of his bribing or offering to bribe an elector. p. 385.
2. **SAME.—Contest.—Statement of.—Constitutional Law.—Statutes.**—A statement of an election contest showing that the contestee (1) gave, and (2) offered to give bribes and rewards to electors to secure his election is based upon article 2, §6, of the Constitution and not upon §2328 Burns 1901, Acts 1889, p. 267, §2, providing that any candidate offering a bribe shall be fined and disfranchised. p. 386.
3. **WORDS AND PHRASES.—"Bribe."**—A "bribe," as used concerning elections, means any gift, advantage or emolument offered, given or promised to any elector to influence his conduct or vote. p. 386.
4. **ELECTIONS.—Contest.—Statement of.—Constitutional Law.**—A statement of an election contest showing that the contestee (1) gave and (2) offered to give bribes to electors to secure his election is grounded upon the constitutional provision (Art. 2, §6), rendering any candidate ineligible who gives or offers to give a bribe to secure his election, although such statement details the giving and offering of such bribes with the particularity required under §2328 Burns 1901, Acts 1889, p. 267, §2, providing that such acts shall constitute a crime. p. 386.

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5. **ELECTIONS.—Candidates.—Eligibility.—Bribery.—Conviction.**—A candidate convicted of bribery is, *ipso facto*, rendered ineligible to accept a public office or to retain one already possessed. p. 387.
6. **SAME.—Contest.—Civil.—Criminal Prosecution.**—A criminal prosecution and conviction is not a condition precedent to the right of an elector to contest the election of a candidate, but the State or an elector has the right to proceed therein independently. p. 387.
7. **CONSTITUTIONAL LAW.—Elections.—Candidates.—Disqualification.**—The constitutional provision (Art. 2, §6), disqualifying from holding office any candidate bribing or offering to bribe an elector, is self-executing and needs no legislative enactment to carry it into effect. p. 389.
8. **EVIDENCE.—Circumstantial.—Bribery.—Identification of Briber.**—Evidence that the witness was called from his house in the night and given \$1 and promised certain work by a person giving his name as that of the candidate for township trustee, is admissible in an election contest, although the witness was unable to identify such candidate as the man who committed such act. p. 389.
9. **SAME.—Identification.—Failure of.—Motion to Strike Out.**—Where circumstantial evidence is introduced tending to show the commission of an act by defendant, but the evidence is not sufficient to connect defendant with the commission thereof, a motion to strike out such evidence should be made. p. 390.
10. **SAME.—Sufficiency.—Question for Jury.**—Where a witness testifies that he was bribed by a person representing himself to be the defendant, and the defendant denies any knowledge thereof and produces a witness who testifies that he (such witness) gave such bribe without defendant's knowledge, defendant's guilt is a proper question for the court or jury. p. 391.
11. **SAME.—Bribery.—Intentions.**—In an action to contest an election, the intent of the taker of a bribe is not material evidence, the intent of the giver being admissible as characterizing the transaction. p. 391.
12. **SAME.—Bribery.—Advice.—Elections.—Contest.**—Where defendant in a contested election case was challenged "for using money to influence voters" the court's refusal to permit him at the trial to answer the question: "Did you request Mr. Cady or Mr. Curd to seek the advice of anybody else?" (concerning the making of an affidavit enabling him to vote) is harmless error. p. 391.
13. **SAME.—Failure to Vote when Challenged for Bribery.—Explanations.**—Defendant, in the trial of an election contest, may

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explain his reasons for his failure to vote at the election when challenged "for using money to influence voters." p. 392.

14. ELECTIONS.—*Questions.—Offers of Proof.—Trial.*—To present any question on appeal concerning the exclusion of evidence, proper questions must be asked the witness and offers of proof, responsive to such questions, made. p. 392.
15. TRIAL.—*Evidence.—Original.—Rebuttal.—Discretion of Court.—Appeal and Error.*—The admission of original evidence in rebuttal is within the discretion of the trial court, such discretion being reviewable on appeal only for abuse. p. 393.
16. JUDGMENT.—*Finding.—Elections.—Contest.—Candidates.—Bribery.*—A finding in an election contest, that the contestee bribed divers electors of his township to vote for him for township trustee sustains a judgment declaring such office vacant. p. 393.
17. APPEAL AND ERROR.—*Weighing Evidence.*—The Supreme Court will not weigh conflicting oral evidence. p. 394.

From Marion Circuit Court (13,749); *Robert W. McBride*, Special Judge.

Election contest by William J. Wallace against Warren E. Tinkle. From a judgment for the contestor, contestee appeals. *Affirmed.*

Spencer & Spencer, Doan & Orbison and *Frederick W. Cady*, for appellant.

Oliver H. Carson and *Hawkins, Smith & Hawkins*, for appellee.

MONTGOMERY, C. J.—This action was commenced by appellee, as an elector, to contest the election of appellant to the office of township trustee of Perry township, Marion county. The cause was transferred by appeal from the board of commissioners to the circuit court, where a trial resulted in a judgment declaring appellant's election null and void, and said office vacant.

We are called upon to review alleged errors in overruling (1) appellant's demurrer to the statement of contest, and (2) his motion for a new trial.

It is specifically alleged in the several paragraphs of the statement of contest that appellant gave intoxicating liquors, loaned, gave, and offered to give, money, offered to

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procure employment, and gave and offered bribes and rewards to certain named electors of said township for the purpose of influencing their votes, and to induce them to work for the election of appellant to said office.

Appellant's counsel contend that this statement is founded upon §2328 Burns 1901, Acts 1889, p. 267, §2, which reads as follows: "Whoever, being a candidate for any office, loans or gives directly or indirectly, or offers or promises to loan or give any money or other thing of value to any elector for the purpose of influencing or retaining the vote of such elector, or to induce such elector to work or labor for the election of such candidate, or to refrain from working or laboring for the election of any other candidate, or to any person to secure or to retain the influence or vote of such elector in his behalf as such candidate, or to be used by such person in any way to influence the vote of any elector, or of electors generally, for himself or any candidate or ticket, and whoever hires or otherwise employs for consideration any person to work at the polls on election day for the election of any candidate to be voted for at such election, shall be fined in any sum not more than \$1,000 nor less than \$300, and shall be disfranchised and rendered incapable of holding any office of profit or trust within this State for any determinate period, and a violation of any provision of this section by any person elected to such office shall render his election void, and if he has taken the office, upon conviction, shall operate as a vacation of the same." It is argued that the statement is insufficient for the reason that no allegation is made that appellant had been convicted in a criminal proceeding of a violation of the provisions of this statute.

The Constitution of this State prescribes a civil penalty to be imposed upon the successful candidate for office guilty of bribery in securing his election, in the following

1. terms: "Every person shall be disqualified for holding office during the term for which he may have

been elected, who shall have given or offered a bribe, threat or reward to secure his election." Const., Art. 2, §6. The statutes prescribing the causes of contest and the mode of procedure provide that any election may be contested on the ground that the contestee is ineligible. §6312 Burns 1901, §4756 R. S. 1881.

It has been expressly held by this court that if a candidate for township trustee gives or offers to give a bribe or reward to secure his election to such office, he will thereby be rendered ineligible, by the terms of the Constitution, to hold such office, and his election may be contested on that ground. *Carroll v. Green* (1897), 148 Ind. 362.

The original statement of contest in this case charged that appellant (1) gave, and (2) offered to give, bribes and rewards to duly qualified electors of said township
2. eligible to vote at said election to secure said contestee's election. It is altogether plain that appellee was then basing his contest upon the disqualification of appellant to hold the office because of alleged violations of the constitutional provision. Upon appellant's motion and insistence the court ordered this statement to be made more specific and definite. It was accordingly amended by filing a supplementary statement describing the means by which appellant was charged with attempting to influence unlawfully the votes of certain named electors. This supplementary statement closely followed the language of §2328, *supra*.

A bribe, as applied to the subject under consideration, may be defined as any gift, advantage, or emolument offered, given, or promised to an elector to influence
3. his conduct or vote. The Constitution disqualifies the briber, and makes him ineligible to hold the office which he covets and attempts to obtain by such unlawful influence. It is clear to our minds that this contest is still grounded upon the constitutional provision
4. above quoted. The fact that the particular offenses relied upon were through appellant's procurement

described in the language of a criminal statute defining bribery, and prescribing penalties therefor, does not make the acts, if true, any the less bribery within the meaning of the constitutional provision, or make a criminal prosecution by the State the only method of determining appellant's right to the office. It is undeniably true that the State

may, on its own initiative, prosecute any candidate
5. for office accused of bribery, and if he be declared elected a conviction would *ipso facto* nullify such election, and if already in possession of the office such conviction would render the same vacant. A criminal prosecution and conviction is not a condition precedent

6. to the maintenance of a civil proceeding by an elector to contest an election to the office of township trustee on account of bribery in securing such election. *Carroll v. Green, supra; Gray v. Seitz* (1904), 162 Ind. 1.

In support of their contention appellant's counsel rely upon the cases of *State, ex rel., v. Humphries* (1889), 74 Tex. 466, 12 S. W. 99, 5 L. R. A. 217, and *Commonwealth v. Jones* (1874), 10 Bush (Ky.) 725. It is provided among other things in the constitution of Texas, "that every person shall be disqualified from holding any office of profit or trust in this state, who shall be convicted of having given or offered a bribe to procure his election or appointment." The Texas supreme court, after setting out this provision, said: "If therefore it should be held that the act of the respondent was within the meaning of the law an offer to bribe the voters, it follows from the section quoted that he could not be deprived of the office until he had been convicted of the offense in a court of competent jurisdiction, and in a proceeding instituted and prosecuted according to the provisions of our code of criminal procedure." The material difference in the constitutional provisions of Texas and of this State is apparent.

The constitution of Kentucky, in force at the time of the decision under consideration, provided, that any person

who should give, accept, or knowingly carry a challenge to fight a duel with a citizen of the state should be deprived of the right to hold any office of honor or profit in that state. In the case of *Commonwealth v. Jones, supra*, the defendant was indicted in two counts, under the following statute: "If any person shall usurp any office established by the constitution or laws of this commonwealth, or shall knowingly hold or pretend to exercise such office after his election or appointment thereto shall have been declared by a court of competent jurisdiction illegal or void, or after his term of office has constitutionally and legally expired, he shall be guilty of a misdemeanor, and fined in a sum not less than \$500 nor more than \$1,500." The first count of the indictment charged that Jones accepted a challenge to fight a duel, and thereby disqualified himself from holding office, and afterwards usurped the office of clerk of the court of appeals. The second count charged that he accepted such challenge, and continued to hold said office, after his election had been declared illegal by a contesting board organized to try the question, which board was alleged to be a "court of competent jurisdiction," etc. The court of appeals held that the constitutional provision was not self-executing, and that a citizen could not be "deprived" of his right to hold office except after a trial and judgment by a judicial tribunal. The first count was held to be insufficient for want of any averment that the fact of his having accepted such challenge had been judicially ascertained, and he had thereby been deprived of his right to hold office. The second count was overthrown upon the ground that said contesting board, composed of officers charged with the performance of executive and ministerial duties, was not a court. In connection with the discussion of judicial and quasi-judicial functions the court said on page 749: "But we regard it as an indisputable proposition that where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and

where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial, and are such as cannot constitutionally be delegated to or imposed upon executive officers." In the course of the discussion the court said that, if instead of the words "shall be deprived" the word "ineligible" or the phrase "shall not be eligible" had been used, some of the difficulties attending the argument to show the provision to be self-executing would have been obviated.

We have already said that this proceeding is not based upon §2328 Burns 1901, Acts 1889, p. 267, §2, of the statutes, but upon §6, article 2, of the Constitution

7. of this State, and this holding did not make it absolutely necessary to distinguish *State, ex rel., v. Humphries, supra*, and *Commonwealth v. Jones, supra*, relied upon by appellant. It has been held by this court that the provision of our Constitution under consideration is self-executing, and needs no legislative enactment to carry it into effect and operation. *Carroll v. Green, supra*. The decision of our court is in harmony with the holdings in the following cases upon somewhat similar provisions: *Commonwealth v. Walter* (1876), 83 Pa. St. 105, 24 Am. Rep. 154; *Royall v. Thomas* (1877), 28 Gratt. (Va.) 130, 26 Am. Rep. 335; *Brady v. Howe* (1874), 50 Miss. 607; *French v. Senate* (1905), 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556. It follows that the statement of contest was sufficient and the circuit court did not err in so holding.

In the motion for a new trial complaint is made of the admission of the testimony of Emanuel Hart, for the reason that he did not positively connect appellant with the

8. transaction detailed. Mr. Hart testified that about two weeks before the election a man came to his home, after dark, called him out behind the barn, said he was Mr. Tinkle, and told him what office he was running

for, gave him \$1, and promised him a job at the school-house in case he were elected. He further testified that he did not know Mr. Tinkle personally, and had never seen him prior to that time. The court pointing to Mr. Tinkle, the appellant, asked whether he was the man, and the witness said: "Well, now, it was in the night, I reckon that must be the man; he told me his name was Mr. Tinkle." The statement of contest charged that appellant had given money to Hart, and offered to procure employment for him, for the purpose of influencing his vote. It was not indispensably necessary to prove that the bribery charged was done by the contestee in person, but the offense might be committed by others at his instance and request. Circumstantial evidence was as competent as direct proof to establish the charge, and appellee was entitled to introduce any evidence tending to prove the allegations made, in any order he might choose to adopt. The transaction detailed constituted the *res gestae* of that specification of the charge relating to Hart, and it was not essential to the admissibility of the evidence that the witness should first positively identify the persons making the proposals in appellant's name. The completeness and certainty of the identification would affect the weight of the evidence rather than its admissibility. The alleged bribery was committed in appellant's behalf and in his name, and under such proved circumstances as clearly justified the court in receiving the evidence at the time it was offered. *People v. Stanley* (1894), 101 Mich. 93, 59 N. W. 498; *Bulkeley v. Butler* (1824), 2 B. & C. 434.

If, when all the evidence was in, appellant was not so identified or connected with the transaction as to entitle it to be considered, a motion to strike out all evidence
9. upon the subject should have been made. 3 Wigmore, Evidence, §1871.

In the course of the proceeding, appellant, as a witness in his own behalf, denied all knowledge of the transaction

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in question, and produced another witness who admitted that he was the person who visited Hart and gave him the \$1, and declared that he did it on his own responsibility. The evidence offered in support of the issue of fact tendered by the charge of bribery relating to Hart, and appellant's answer in denial thereof, was rightly heard by the court, and it must be presumed that he properly weighed the testimony submitted. No error was committed by the court in this respect.

Appellant's counsel asked the witness Hart, upon cross-examination, the following question: "What did you take that \$1 for?" To this question appellee objected,

11. and the objection was sustained. In support of their contention that this evidence was admissible, appellants invoke the rule that, where intent is the gist of an alleged offense or a material element in a transaction, a party on trial involving such offense or transaction may, as a witness in his own behalf, testify to his intent, as declared in the case of *Greer v. State* (1876), 53 Ind. 420, and in a number of more recent cases. The witness Hart was not on trial in this proceeding, and his unexpressed reason or motive for receiving the offered money was not in issue. The intent and purpose of the giver of the money may have been material, if given by or at the instance of appellant, and such intention was for the determination of the court from what was said and done in connection with the payment of the money and in the light of all attendant circumstances given in evidence, including the testimony of the giver as to his intention, if he elected so to testify.

Appellee introduced evidence showing that at 6:15 o'clock a. m. on election day appellant presented himself at the polls as a voter, and upon offering to vote was challenged

12. "for using money to influence voters;" that he was directed to stand aside, and get from the inspector a blank affidavit provided for in §2331 Burns 1901, Acts 1889, p. 267, §5, which he did; that he read the affidavit,

consulted with his attorney, who was present, then drove off to other places in the township, and did not make the affidavit, or again offer to vote, or at any time make any explanation of his failure to vote.

Appellant was a witness in his own behalf, and while upon the stand his counsel asked him the following question: "Did you request Mr. Cady or Mr. Curd to seek the advice of anybody else?" An objection to the question was made, and thereupon appellant offered to show that he sought advice of the county chairman as to the form of affidavit he would be required to make in order to vote, and sent a messenger for that information; and, also, in the same manner sought such advice and information from Mr. Spencer, an attorney. Appellee's objection was sustained, and the ruling is relied upon as an error. The responsive answer to the question propounded would have been either yes or no. The failure of appellant to vote when challenged for bribery, or to make the proper affidavit

13. in denial of the charge, or otherwise to speak at the time in response to the accusation, was shown as in the nature of an admission of guilt. We think appellant had the right in his own defense to give his version of this incident, and his reasons for the course of conduct adopted, in order to refute or qualify the force of the alleged admission. The purpose of the question having been disclosed by the offer made, its relevancy was apparent, and appellant should have been permitted to answer it. The answer to this question, however, standing alone, would have no weight in determining the question at issue, and its absence is accordingly of no consequence. The proof offered was not responsive to the question propounded, but very much broader, and yet it did not purport to show that

14. appellant obtained the advice sought, or that his conduct was influenced by any such counsel or advice. It is a familiar rule of practice that pertinent and appropriate questions, designed to elicit the evidence de-

sired, must be asked of a witness upon the stand, and timely offers of the proof to be elicited in response thereto made, in order to present to an appellate court an alleged error on account of the exclusion of such evidence. *Elliott, App. Proc.*, §746; *Ewbank, Ind. Trial Ev.*, §286. The question argued by counsel is not presented by the record, and no error on account of the exclusion of evidence is shown.

Complaint is also made that appellee's witness Luther Tex testified to original matter in rebuttal. Conceding this to be true, it does not constitute reversible error.

15. The admission of additional evidence, or evidence out of its regular order, is within the discretion of the trial judge, and to make such action erroneous it must be made to appear that the court abused this discretion. *Miller v. Dill* (1898), 149 Ind. 326, 335; *Ellison v. Branstator* (1899), 153 Ind. 146, 157; *Stewart v. Smith* (1887), 111 Ind. 526; *Morris v. State, ex rel.* (1884), 94 Ind. 565, 570.

It is suggested that the finding did not authorize the judgment that the office was vacant. The finding was general, and not special, and it was found that the

16. allegations of the statement of contest were true and fully proved, and, proceeding, it is shown by the record that "the court further finds, however, that prior to said election, and after said contestee had been nominated as a candidate for said office, and, as such candidate, said contestee did, as charged in said statement of contest, offer and give bribes and rewards, and offer and give money and other things of value, and offer and promise to loan and give money and other things of value to sundry and divers qualified electors of said township, eligible to vote at said election, to secure said contestee's election, and for the purpose of influencing and retaining the votes of such electors and to induce such electors to work and labor for the election of said contestee to said office; that said contestee gave money and other things of value to divers and sundry per-

sons to secure and retain the influence and votes of duly qualified electors of said township eligible to vote at said election in behalf of said contestee as such candidate, and to be used by such persons to influence the votes of such electors in behalf of said contestee; that said contestor is entitled to have his said contest of the election of said contestee sustained." This finding is clearly sufficient to uphold the judgment rendered, and appellant is in no position to complain because the court did not find and adjudge that some opposing candidate was entitled to the office, if it were admitted that in this proceeding such a finding and judgment were allowable, which we are not to be understood as admitting or intimating to be the law.

The sufficiency of the evidence to sustain the decision is earnestly discussed and urged upon our consideration.

The underlying reasons have been frequently stated

17. and the rule is firmly established, precluding this court from weighing conflicting oral testimony.

Parkison v. Thompson (1905), 164 Ind. 609; *Hudelson v. Hudelson* (1905), 164 Ind. 694. In cases of this character, the credibility of witnesses is deeply involved, and the illegality of acts charged is seldom susceptible of positive proof, but must be inferred from other facts and circumstances shown by the evidence. It is manifest that we are in no position justly to weigh such evidence, even though the rules of law permitted us to attempt such a task. Without attempting to determine the preponderance, we find sufficient evidence in support of the charges to sustain the conclusion of the trial court, and, under these circumstances, are not warranted in disturbing the judgment.

The judgment is therefore affirmed.

JONES v. ALEXANDER ET AL.

[No. 20,812. Filed November 27, 1906.]

1. INTOXICATING LIQUORS.—*License.—Remonstrance.—Burden of Proof.—Evidence.—Statutes.*—Under §7283i Burns 1905, Acts 1905, p. 7, the burden of proof that a remonstrance was filed against the granting of license to sell intoxicating liquors at retail, is upon the remonstrators, and the *ex parte* order of the board of commissioners that a remonstrance theretofore filed contained a majority of the electors concerned is not evidence of such fact. p. 397.
2. SAME.—*Remonstrance.—Statutes.—Claiming Benefits of.*—A litigant claiming the benefits of a statutory provision must bring himself clearly within such provision. p. 397.
3. CONSTITUTIONAL LAW.—*Intoxicating Liquors.—Remonstrance.—Statutes.*—The act of 1905 (Acts 1905, p. 7, §7283i Burns 1905) is constitutional. *Cain v. Allen*, 168 Ind. —, followed. p. 398.

From Wabash Circuit Court; *A. H. Plummer*, Judge.

Application by George B. Jones for license to sell intoxicating liquors, against which Jacob Alexander and others remonstrate. From a judgment for remonstrants, the applicant appeals. *Reversed.*

D. F. Brooks, for appellant.

Shively & Switzer, J. F. Lewis and *L. H. Oberreich*, for appellees.

JORDAN, J.—Three days before the beginning of the regular June session, 1905, of the board of commissioners of Wabash county, Indiana, a general or “blanket” remonstrance, as authorized by section nine of the Nicholson law as amended by the act of 1905 (Acts 1905, p. 7, §7283i Burns 1905), purporting to be signed by a majority of the legal voters of Liberty township, in said county, was filed with the auditor, whereby the signers remonstrated against the granting of a license to any applicant to sell intoxicating liquors in said township. The board of commissioners at said session took action upon said remonstrance, and

made a finding that the persons whose names were signed thereto were legal voters at the time of its filing, and that it contained the signatures of a majority of the voters of said township. No application had been made by any person for a license to be granted to him at said session of the board, and no notice had been given by any person that he would apply for a license at said session.

At the August session, 1905, of said board, appellant, after giving the notice exacted by the license law of 1875 (Acts 1875 [s. s.], p. 55, §3, §7278 Burns 1901), filed the application herein involved, whereby he sought to secure a license to sell intoxicating liquors at Lafontaine, in said Liberty township. The board at said August session declined to hear any proof on the part of the applicant in regard to his right to a license, but dismissed his application on the ground that it had been ousted of jurisdiction in the matter by the finding of said board, entered of record as heretofore stated, at said June session. From this decision he appealed to the circuit court.

After much maneuvering in the proceedings before the court, the filing of demurrers and appearances of certain persons as friends of the court who were permitted to file an answer, to which a reply was filed, etc., the cause was submitted to the court for trial, and, after hearing the evidence, the court found against appellant, and that the board of commissioners, in which the proceedings were instituted, had no jurisdiction over the matter therein, and no authority to grant such license to said appellant, and that said application ought to be dismissed. It was ordered dismissed, and a judgment was rendered in favor of appellees for costs. Appellant moved for a new trial, assigning the statutory causes. This motion was overruled, to which ruling he excepted, and an appeal was taken to this court. The ruling of the court upon the motion for a new trial is one of the errors assigned.

The evidence in the case discloses that appellant made proof of the notice which he gave, and of his fitness to be entrusted with a license under the provisions of the

1. act of 1875, *supra*. Appellees at the trial in the lower court, in order to defeat the granting of a license to appellant, appear to have relied upon the finding made by the board of commissioners at the June session, 1905, in the *ex parte* proceeding on said remonstrance to establish the fact that it was signed at the time of its filing by a majority of the legal voters of said Liberty township. Aside from such finding as it appeared of record, no other evidence was introduced upon the trial to establish that the remonstrance had been so signed at the time it was filed with the county auditor. The right to file the remonstrance here involved by appellees was awarded to them by section nine, *supra*, as amended. Such right, therefore, being wholly statutory, could be exercised only by the persons designated by the statute. Consequently the burden rests upon appellees, as remonstrators under the statute in question, to show that at the time the remonstrance was filed it responded to the requirements of the statute, for the rule is well affirmed that in an action or proceeding wherein a person or persons seek to avail

2. themselves of a right conferred by a statute, the burden is cast upon them to bring themselves by the facts established substantially within its provisions. *Goodwin v. Smith* (1880), 72 Ind. 113, 37 Am. Rep. 144; *Massey v. Dunlap* (1896), 146 Ind. 350; *Board, etc., v. Jarnecke* (1905), 164 Ind. 658, 664, and authorities there cited; *Indianapolis, etc., Transit Co. v. Foreman* (1904), 162 Ind. 85, 102 Am. St. 185.

The action of the board of commissioners, under the circumstances herein, in assuming to take jurisdiction at its June session, 1905, and in making the finding and order which it did, was unauthorized, and, therefore, as held in *Cain v. Allen* (1907), 168 Ind. —, in all respects was a

nullity, and entitled to no consideration whatever. The constitutional validity of the act here involved is

3. assailed upon virtually the same grounds as those advanced and urged in *Cain v. Allen*, *supra*. The validity of the law in controversy was upheld in the latter appeal, and that decision must rule that question and the questions presented in this case. As there is an entire absence of any evidence to establish that the remonstrance, at the time of its filing, had been signed by a majority of the legal voters of Liberty township, as the statute exacted, it must therefore follow that the decision of the trial court is not sustained by the evidence, and appellant's motion for a new trial should have been granted.

The judgment is therefore reversed, and cause remanded, with instructions to the lower court to grant appellant a new trial, and for further proceedings not inconsistent with this opinion and the holding in the case of *Cain v. Allen*, *supra*.

LANHAM v. WOODS ET AL.

[No. 20,820. Filed November 27, 1906.]

1. CONSTITUTIONAL LAW.—*Intoxicating Liquors*.—*Remonstrance*.—The act of 1905 (Acts 1905, p. 7, §7283i Burns 1905), giving the voters of any township or city ward the right to prevent by remonstrance the issuance of a license to retail intoxicating liquors in such township or ward, is constitutional. *Cain v. Allen*, 168 Ind. —, followed. p. 400.
2. INTOXICATING LIQUORS. — *License*. — *Remonstrance*.—*Appeal and Error*.—An appeal from a judgment of the board of commissioners dismissing an application for the sale of intoxicating liquors is not from the *ex parte* prior proceeding adjudging sufficient a remonstrance theretofore filed against the issuing of any license in the appellant's township or ward. p. 401.
3. SAME. — *License*.—*Remonstrance*.—*Procedure*.—Remonstrants under §7283i Burns 1905, Acts 1905, p. 7, are adverse parties to an applicant for liquor license subsequently filing an appli-

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cation in the township or ward covered by such remonstrance; and such applicant is entitled to a hearing on his application and to question the validity of such remonstrance. p. 401.

4. **INTOXICATING LIQUORS.**—*Application.*—*Remonstrance.*—*Appeal and Error.*—Under §7280 Burns 1901, Acts 1889, p. 288, applicants and remonstrants in proceedings to obtain liquor licenses have the right of appeal from an adverse decision. p. 401.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Application by George B. Lanham, against which William J. Woods and others remonstrate. From a judgment for remonstrants, the applicant appeals. *Reversed.*

Albert C. Pearson, for appellant.

J. F. Lewis and *David McMath*, for appellees.

JORDAN, J.—The facts in this case disclose that at the regular February session, 1906, of the board of commissioners of Hamilton county, Indiana, appellant, having given the required notice of his intention to apply at said session for a license to retail intoxicating liquors, under the license law of 1875 (Acts 1875 [s. s.], p. 55), applied to said board for a license to be granted to him to sell such liquors at a place in Adams township, in said county. On the Friday prior to the first Monday in February, 1906, on which day said February session of the board commenced, a general remonstrance, purporting to be signed by a majority of the legal voters of said Adams township, was filed with the county auditor. This remonstrance was based upon section nine of the Nicholson law, as amended by the act of 1905 (Acts 1905, p. 7, §7283i Burns 1905). By said remonstrance the persons whose names were signed thereto remonstrated against the granting of a license to any person for the sale of intoxicating liquors in said Adams township. Proceedings appear to have been had before the board upon appellant's application, and the board, after being duly advised, it appears, made an order dismissing the application and denying the license. From this decision appellant, within the time and

in the manner required by §7280 Burns 1901, Acts 1889, p. 288, appealed to the Hamilton Circuit Court. In the latter court appellees, being the persons who signed said remonstrance, appeared by their attorney and filed a motion to dismiss appellant's appeal for the following reasons: (1) The court had no jurisdiction to try and determine the appeal; (2) appellant was not a party to or against said remonstrance filed with the auditor of Hamilton county, Indiana, on February 2, 1906; (3) the statute regulating appeals from the action of the board of county commissioners had not been complied with by appellant; (4) the record in the case shows no right of appeal by appellant. This motion, without any evidence being submitted or heard in the matter, the court sustained, and dismissed the appeal and rendered judgment for costs against appellant. From this judgment he appeals to this court, and assigns error upon the ruling of the court in dismissing the appeal.

Among other things, appellant assails the constitutional validity of section nine as amended by the aforesaid amendatory act. The questions which he presents

1. on this point, however, were decided adversely to his insistence in the appeal of *Cain v. Allen* (1907), 168 Ind. —. He earnestly insists that he, under the law, was authorized to prosecute an appeal from the order or judgment of the board of commissioners to the circuit court, and was, therefore, entitled to a hearing in that court. On the other hand, counsel for appellees argue and insist that the proceedings had before the board of commissioners on the remonstrance in question were *ex parte* under section nine, and that appellant, not being a party thereto, had no right to take an appeal to the circuit court. It is further contended that no appeal from the board of commissioners in its decision in the matter of appellant's application is authorized by said section nine as amended, and that, therefore, the circuit court had no right to assume jurisdiction over the appeal, and that the decision of the

board of commissioners was conclusive upon all the questions in regard to said remonstrance, and, therefore, there was nothing in respect thereto to be heard and determined in the circuit court.

No question is raised or presented that appellant did not give the required notice provided by law of his intention to file his application. The action of the

2. court in dismissing the appeal is justified by counsel for appellees on the ground that, under the provisions of said section nine as amended, appellant had no right to take an appeal from the decision of the board of commissioners, in the proceedings instituted by him to obtain a license. The appeal taken by appellant was not from an order or judgment of the board in an *ex parte* proceeding, but was prosecuted from the order of the board in dismissing his application for a license in which proceedings the remonstrance was a document, and

3. appellant was under the law entitled to a hearing thereon. *Cain v. Allen, supra*. The remonstrators had instituted no independent proceeding by filing their remonstrance; thereby they made themselves adverse parties to appellant in said action. Section 7280, *supra*, expressly grants to an aggrieved applicant or remonstrator the right of appeal to the circuit court from

4. the decision of the board of commissioners in granting or refusing a license to retail intoxicating liquors. In *Wilson v. Mathis* (1896), 145 Ind. 493, in considering whether the provisions of the act of 1895 (Acts 1895, p. 248, §7283a *et seq.* Burns 1901—the same being the Nicholson law) deprived an applicant, in a proceeding for a liquor license, of the right to take an appeal from the decision of the board of commissioners to the circuit court under §7280, *supra*, the court said: "We recognize nothing in section nine [Acts 1895, p. 248], or any other of the provisions of the act of 1895, which can be said to change, impair, or destroy this right which is expressly given under

the section above cited. It follows, therefore, that it still exists." To the same effect is *Wilson v. Karst* (1896), 145 Ind. 697. In *Ludwig v. Cory* (1902), 158 Ind. 582, the right of appeal from the decision of the board of commissioners, by an applicant for a license, is expressly recognized. There is nothing in section nine as amended, under the construction accorded to it by this court in *Cain v. Allen, supra*, which can be said to deny appellant the right of appeal from the decision of the board of commissioners in this case. That he had such right is fully sustained by the decisions above cited.

It follows that the court erred in dismissing his appeal, for which error the judgment is reversed, and the cause remanded, with instructions to the trial court to reinstate the cause on the docket and to overrule the motion to dismiss.

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188	415

167	402
171	447

INDIANAPOLIS TRACTION & TERMINAL COMPANY v. KIDD.

[No. 20,850. Filed November 27, 1906.]

1. **APPEAL AND ERROR.**—*Complaint.*—*Initial Attack on Appeal.*—*Evidence.*—*Verdict.*—A complaint, attacked for the first time on appeal, is sufficient if it will bar another action for the same cause, mere defects therein being cured by the evidence and verdict. p. 405.
2. **STREET RAILROADS.**—*Use of Streets.*—*Rights of Others.*—Street railroad companies have no superior rights in the use of the streets occupied by their tracks, but they have the right not to be unnecessarily interfered with or obstructed in the running of their cars. p. 407.
3. **MUNICIPAL CORPORATIONS.**—*Streets.*—*Rights of Users.*—*Street Railroads.*—All users of the public streets of a city have equal rights to the use of all parts thereof, subject to the condition that the use made shall not unnecessarily interfere with similar rights of others in such use. p. 407.

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4. **NEGLIGENCE.—Street Railroads.—Tracks.—Use of, by Pedestrians.**—In determining the questions of due care and contributory negligence of a pedestrian using a street car track as a footway, all of the circumstances are to be considered. p. 408.
5. **STREET RAILROADS.—Tracks.—Pedestrians Using.—Rights.**—Street railroad companies cannot lawfully exclude pedestrians from their tracks, but it is the duty of such pedestrians when they ascertain or are notified of the approach of a car temporarily to abandon the track to let the car pass. p. 408.
6. **SAME.—Running Down Pedestrians.—Presumptions.**—A pedestrian, walking along a street car track, has the right to presume that cars will not be run at an excessive speed, and that a car, approaching from the rear, will not be run over her without warning. p. 408.
7. **SAME.—Negligence.—Failure to Observe.**—It is the duty of the motorman operating a street car to use ordinary care for the safety of persons or vehicles upon the track, but such care implies a high degree of watchfulness and vigilance when the car is running at a rapid speed in a populous part of a city. p. 409.
8. **SAME.—Running Down Pedestrian.—Contributory Negligence.**—A lady walking between the street car tracks, who looked for a car before she entered upon the track, and again after traveling half a square, the track being clear of ice and snow, and the sidewalk and rest of the street being covered therewith, and who was run over by a car approaching without warning from the rear, is not guilty of contributory negligence as a matter of law. p. 409.
9. **JUDGMENT.—Verdict.—General.—Special.—When Controls.**—The answers to the interrogatories to the jury control the general verdict only where the antagonism between them is so great that no evidence admissible under the issues could harmonize them. p. 409.
10. **NEGLIGENCE.—Proximate Cause.—Contributory Negligence.**—To deny a recovery of damages negligently caused, on the ground of contributory negligence, it must appear that such contributory negligence proximately, actively and contemporaneously contributed to such injury. p. 410.
11. **STREET RAILROADS.—Running Down Pedestrian.—Proximate Cause.—Contributory Negligence.**—Where a woman looked for an approaching car and saw none before going upon a street car track, and after walking half a square looked back for a car and saw none, her continuing to walk on such track without looking back is not a proximate, but a remote, cause of an injury occasioned by the motorman's running his approaching car, without warning, against her. p. 410.

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12. NEGLIGENCE.—*Contributory*.—*Last Clear Chance*.—Where defendant knows or should know of plaintiff's negligence in time to avoid any injury therefrom, his failure so to avoid injury to the plaintiff becomes the proximate and efficient cause of such injury. p. 411.
13. SAME.—*Street Railroads*.—*Person on Track*.—*Knowledge of*.—A street railroad company is chargeable with knowledge of a woman's presence on the track, where the motorman had an unobstructed vision of her for 1,000 feet. p. 412.
14. EVIDENCE.—*Opinions*.—The opinion of a witness upon facts and conditions which can be fully placed before the jury is not admissible in evidence. p. 412.
15. SAME.—*Exclusion*.—*Harmless Error*.—*Interrogatories to Jury*.—Answers to the interrogatories to the jury showing certain facts in favor of defendant render harmless any error in excluding evidence tending to show such facts. p. 413.
16. APPEAL AND ERROR.—*Briefs*.—*Instructions*.—Instructions questioned but not set out in the briefs cannot be considered on appeal. p. 413.
17. SAME.—*Erroneous Instructions*.—*Procured by Appellant*.—Defendant may not complain of erroneous instructions given at its request. p. 413.
18. DAMAGES.—*Doctors' Bills*.—*Street Railroads*.—*Husband and Wife*.—The wife may recover doctor's bills, contracted to be paid for by herself, as part of the damages caused by negligent injuries inflicted upon her by a street railroad company. p. 414.
19. APPEAL AND ERROR.—*Weighing Evidence*.—The Supreme Court will not disturb a verdict where the evidence was conflicting. p. 415.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Lulu Kidd against the Indianapolis Traction & Terminal Company. From a judgment on a verdict for plaintiff for \$3,500, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed*.

F. Winter, *W. H. Latta* and *L. H. Oberreich*, for appellant.

M. A. Ryan and *Gavin & Davis*, for appellee.

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MONTGOMERY, C. J.—This is an action for damages resulting to appellee from appellant's alleged negligence in running one of its cars without warning, at a high rate of speed, against and over her while walking along its track.

A reversal of the judgment is sought for the reasons: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in overruling appellant's motion for judgment in its favor on the answers of the jury to interrogatories; (3) the court erred in overruling appellant's motion for a new trial.

The complaint was not challenged in the trial court. It is contended that the complaint upon its face discloses an assumption of the risk and contributory negligence

1. on the part of the appellee, notwithstanding the allegations that appellee exercised due care and precaution for her safety, and that she was without fault. It is well settled that when a complaint is attacked for the first time in this court, it will be upheld if the facts alleged are sufficient to bar another suit for the same cause of action. We do not find the suggested defects to be real, and any want of certainty in the pleading was cured by the evidence and verdict, and upon numerous decided cases we accordingly hold the complaint sufficient as against the present assault. *Lengelsen v. McGregor* (1904), 162 Ind. 258; *City of South Bend v. Turner* (1901), 156 Ind. 418, 54 L. R. A. 396; *Shoemaker v. Williamson* (1901), 156 Ind. 384; *Xenia Real Estate Co. v. Macy* (1897), 147 Ind. 568; *Citizens St. R. Co. v. Willooby* (1893), 134 Ind. 563; *Loeb v. Tinkler* (1890), 124 Ind. 331; *Peters v. Banta* (1889), 120 Ind. 416; *Smith v. Smith* (1886), 106 Ind. 43.

In answer to interrogatories, the jury found the following facts: At the time of the accident appellant had a standard-gauge, double-track street railroad on East Tenth street in the city of Indianapolis, extending two or three

squares to the east of the place of the accident, and for a long distance westward, the tracks being five feet apart. The street was paved with brick. East-bound cars ran on the south track and west-bound cars, on the north track. Appellee had lived in the neighborhood of the place of the accident for four years, and was familiar with the location of the tracks and the manner in which cars were operated thereon. The accident occurred in daylight, on a clear day, and appellee at the time was forty-seven years of age, possessed of ordinary intelligence, of good eyesight and hearing, and of the use of all her faculties and powers of locomotion. Appellee lived on the south side of Tenth street and her daughter lived on the same side east of her residence. Appellee started on foot to her daughter's home, and had walked about five hundred feet along appellant's track eastward before the accident occurred. The car could have been seen by appellee, had she looked, for a distance of from one-quarter to one-half mile before it reached her, and she could have gotten out of the way by stepping five or six feet to either side, had she known the car was approaching. There was no evidence to show whether any noise was made by the approaching car, or whether appellee with ordinary care could have heard it approach. Appellant's tracks had been swept practically clean of ice and snow, and on the south side of the tracks there was at the time and place of the accident from six to fourteen inches of melting snow and ice, and about the same depth between the tracks. Appellee's view westward of the place of the accident for 1,000 feet was unobstructed, and by looking westward she could have seen the approaching car when that distance away, and for a distance of one hundred feet she could at any point have stepped out of the way of the car had she known it was approaching, but the noise of a west-bound car prevented her from hearing its approach. On entering upon the tracks and again after she had proceeded about half a square appellee looked westward to

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ascertain whether a car was coming, but no car was then in sight. The car was operated by electricity and was traveling at a rate of from twenty to twenty-five miles per hour, and the motorman did not see appellee, or know that she would not leave the track, until he was within ten feet of her, and that, under existing conditions, the car could have been stopped within a distance of from one hundred fifty to one hundred seventy-five feet. Appellee looked and continuously listened, and used ordinary care to avoid the accident.

Appellant's counsel argue that judgment should have been rendered in favor of appellant upon these facts, notwithstanding the general verdict, because appellee is shown to have been guilty of contributory negligence. This contention appears to be predicated upon a misconception of the rights of the respective parties to the use of the street.

It is a familiar principle, frequently reiterated by

2. the courts, that street railway companies have no superior and predominant right to the use of the streets upon which their tracks are located over the rights of other users, except the right of way when they require it. *Indianapolis St. R. Co. v. Darnell* (1904), 32 Ind. App. 687; *Indianapolis St. R. Co. v. O'Donnell* (1905), 35 Ind. App. 312; *Buttelli v. Jersey City, etc., R. Co.* (1896), 59 N. J. L. 302, 304, 36 Atl. 700; *Baltimore, etc., R. Co. v. Cooney* (1898), 87 Md. 261, 286, 39 Atl. 859; *Rapp v. St. Louis Transit Co.* (1905), 190 Mo. 144, 161, 88 S. W. 865.

The highways are laid out for passage, and each passer, in a vehicle or on foot, has a right of passage over the same, subject to the condition that he does not unneces-

3. sarily interfere with the lawful exercise of a similar right by others. Pedestrians have a right to use any part of such highways, but the question whether a particular use is such as a reasonably prudent person would make must depend upon the attendant circumstances.

When a certain portion of the highway has been

4. paved as a sidewalk, or otherwise reserved for the exclusive use of foot passengers, and the same is unobstructed and in suitable condition for such use, it may not be prudent to walk in the roadway set apart for the use of vehicles. In considering the question of appellee's alleged contributory negligence, due regard for the reciprocal rights, duties, and obligations of appellant must be observed. Appellant had no right to exclude appellee

5. from its track upon the street, but had the right merely to require her to remove therefrom when she ascertained or was notified that the same was needed for the passage of one of its cars. It appears, from the facts specially found by the jury, that the street along which appellee was passing was covered with melting snow and ice to a depth of from six to fourteen inches, except the space between the rails of appellant's tracks, which was paved with brick and was practically free from all obstructions. This condition of the street explains appellee's use of the track. She was required to use ordinary care for her safety, and the duty which she owed to the company was to vacate the track when apprised that the same was required for the passage of a car. It must be borne in mind, as against this motion, that the jury were authorized to find that

6. she had a right to assume that appellant's cars would not be run at an excessive rate of speed, and that she was not required to anticipate that a car upon a straight track, in broad daylight, would run her down from the rear without any warning. *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490; *Indianapolis St. R. Co. v. O'Donnell, supra*; *Memphis St. R. Co. v. Haynes* (1904), 112 Tenn. 712, 81 S. W. 374, 379; *Polacci v. Interurban St. R. Co.* (1904), 90 N. Y. Supp. 341; *Kolb v. St. Louis Transit Co.* (1903), 102 Mo. App. 143, 149, 76 S. W. 1050.

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Appellant's servants in charge of the operation of its cars were required to exercise diligent and constant watchfulness for persons who might be upon or approach-

7. ing the track. Such servants are required to take notice of obvious obstructions to the ordinary and free use of the street. The drivers of such cars are chargeable only with the exercise of ordinary care for the safety of other users of the street, but ordinary care in law implies a high degree of watchfulness and vigilance when propelling a car at a speed of from twenty to twenty-five miles per hour through the streets of a populous city, where persons on foot and in vehicles are constantly passing and repassing, including the aged, infirm, and crippled, as well as children, thoughtless and wanting in prudence and discretion. The accident to appellee occurred in day-

8. light and at a point where the track from the west was straight, and she could have been seen by the most casual attention on the part of the motorman when the car was 1,000 feet distant. Appellee looked westward when she entered upon the track, and again when she had proceeded half a square on her journey, but no car was then in sight. She listened continuously as she advanced, but failed to discover the approach of the car, and, under the circumstances shown, we are unable to say that she did not have a right to expect that she would be notified of its coming by the customary alarm signal. The jury specially found that the precautions taken for her safety by so looking and listening constituted ordinary care and prudence. We need not decide whether this is a conclusion or not.

The rule is well settled that such special findings

9. override the general verdict only when both cannot stand, and the antagonism is apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues. *Pittsburgh, etc., R. Co. v. Lightheiser* (1907), 168 Ind. —, 78 N. E. 1033; *Indianapolis Union R. Co. v. Ott* (1895),

11 Ind. App. 564, 568. We cannot say that there is any conflict between the general verdict and the facts specially found by the jury in this case, or, in other words, that it affirmatively appears from such facts that appellee was guilty of contributory negligence.

A right of action in favor of a person injured by the negligence of another is denied only where his own negligence proximately contributes to produce such in-

10. jury. It should appear that the complaining party was actively and contemporaneously at fault at the time the injury of which he complains was wrongfully inflicted, to preclude a recovery of damages. *Harrington v. Los Angeles R. Co.* (1903), 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. 85; 1 *Shearman & Redfield, Negligence* (5th ed.), §99.

In this case it is manifest that appellee exercised special care and precaution for her safety when entering upon the track, and for some distance as she proceeded east-

11. ward. Immediately preceding the accident her back was toward the approaching car, and she was prevented from hearing the noise ordinarily made by its approach by the running of a car westward on the north track, and no alarm was sounded to notify her of the impending danger. It follows, therefore, that although appellee's conduct in walking with her back to the westward, without a constant watchout for the approach of a car from that direction, might be characterized as negligent in some degree, yet she is not shown to have been at fault at and immediately before the time of the accident, and her so-called negligence in being in a place of danger under the circumstances shown was not a proximate, but only the remote, cause of her injuries. *Indianapolis St. R. Co. v. Schmidt* (1905), 35 Ind. App. 202; *Birmingham R., etc., Co. v. Brantley* (1904), 141 Ala. 614, 37 South. 698.

This case falls clearly within the rule that where the negligence of the defendant is the proximate cause of the

injury for which suit is brought, and that of the

12. plaintiff only the remote cause, the plaintiff may recover notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury and not the remote cause which may have antecedently contributed to it. This principle has been styled the doctrine of "last clear chance," and is regarded as an exception to the general rule forbidding recovery by a plaintiff guilty of contributory negligence. It is no departure from just principles, but a wholesome and humane doctrine, to hold, that if after the defendant knew, or in the exercise of ordinary care ought to have known, of the plaintiff's negligence, he could have avoided the accident, but failed to do so, the plaintiff can recover. In cases of this class, the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff. The principle that the plaintiff's act or omission, when only a remote cause, antecedent occasion, or condition of the injury, does not constitute such contributory negligence as precludes a recovery is quite generally accepted, and has been declared by many courts. 7 Am. and Eng. Ency. Law (2d ed.), 375; *Indianapolis Traction, etc., Co. v. Smith* (1906), 38 Ind. App. 160; *Southern Ind. R. Co. v. Fine* (1904), 163 Ind. 617; *Indianapolis St. R. Co. v. Bolin* (1906), 39 Ind. App. 169; *Grand Trunk R. Co. v. Ives* (1892), 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485; *Island, etc., Coasting Co. v. Tolson* (1891), 139 U. S. 551, 558, 11 Sup. Ct. 653, 35 L. Ed. 270; *Birmingham R., etc., Co. v. Brantley*, *supra*; *Memphis St. R. Co. v. Haynes*, *supra*; *Baltimore Traction Co. v. Wallace* (1893), 77 Md. 435, 442, 26 Atl. 518; *Baltimore, etc., R. Co. v. Cooney*, *supra*; *Richmond Traction Co. v. Martin* (1903), 102 Va. 209, 45 S. E. 886; *Kolb v. St. Louis*

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Transit Co., supra; Jett v. Central, etc., R. Co. (1903), 178 Mo. 664, 673, 77 S. W. 738; *Rapp v. St. Louis Transit Co., supra; Di Prisco v. Wilmington City R. Co.* (1903), 4 Pen. (Del.) 527, 57 Atl. 906; *Orr v. Cedar Rapids, etc., R. Co.* (1895), 94 Iowa 423, 62 N. W. 851; *Flynn v. Louisville R. Co.* (1901), 23 Ky. L. Rep. 57, 62 S. W. 490; *Richter v. Harper* (1893), 95 Mich. 221, 54 N. W. 768; *Rider v. Syracuse, etc., R. Co.* (1902), 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; *Harrington v. Los Angeles R. Co., supra; Deans v. Wilmington, etc., R. Co.* (1890), 107 N. C. 686, 12 S. E. 77, 22 Am. St. 902; *Little v. Boston, etc., Railroad* (1903), 72 N. H. 61, 55 Atl. 190; *Coombs v. Mason* (1903), 97 Me. 270, 54 Atl. 728; *El Paso, etc., R. Co. v. Kendall* (1905), (Tex. Civ. App.), 85 S. W. 61.

It is clear from the facts found, that, by the exercise of ordinary care while giving attention to his duties, the driver of the car which was run upon appellee could have

13. discovered her presence and apparent ignorance of the impending danger in ample time to prevent the accident, and is accordingly chargeable with such knowledge, and it follows that the court rightly overruled appellant's motion for judgment in its favor.

Appellant's motion for a new trial alleged that the verdict is not sustained by sufficient evidence and is contrary to law, and that the court erred in refusing to per-

14. mit witnesses for appellee, upon cross-examination, to answer the following questions: "That would not prevent it, would it?" and "she could step off, could she not, and prevent the collision?" and, also, in giving each of the instructions given at the request of appellee. The questions excluded related to the condition of the street adjacent to the track upon which appellee was walking at the time of the accident. The questions were objectionable in form, and called for an opinion of the witness upon facts and conditions which could be fully placed before the jury.

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American Tel., etc., Co. v. Green (1905), 164 Ind. 349, and cases cited.

It also affirmatively appears that no harm resulted to appellant from these rulings, even though they were conceded to be erroneous. In answer to interrogatory

15. thirty, the jury expressly found that within one hundred feet of the place of the accident there was nothing to prevent appellee from stepping far enough from the track to be out of the way of the passing car, if she had known it was coming. The jury, therefore, found the fact and conclusion upon this point in accord with appellant's contention, and left no room for complaint.

The court gave twenty-one instructions at the request of appellee. Their number forbids detailed discussion, but they were applicable to the case, and in the main embodied legal principles declared in the cases of *Indianapolis St. R. Co. v. Schmidt, supra*, and *Indianapolis St. R. Co. v. Darnell* (1904), 32 Ind. App. 687, and were in accord with the law as announced and approved in the preceding part of this opinion.

The court gave thirteen instructions at the request of appellant, and it is now insisted that some of them were in conflict with instructions given at the request of

16. appellee. The instructions given at appellee's request were correct statements of the law applicable to the facts established by the evidence. The instructions given at appellant's request are not set out, either in full or in substance, in appellant's brief, and we are precluded by our rules from searching the record in order to make the comparison suggested. It is clear, at all events, that

17. if the instructions given by the court independently of appellant's request were correct, as we have found them to be, appellant could not be allowed to procure the giving of an inapplicable, inconsistent, or erroneous instruction, and thereupon be heard to complain of such error. Elliott, App. Proc., §626.

The complaint alleged that in attempting to cure herself and to heal her wounds appellee had expended the sum of \$200 for doctor bills and medicine. The evidence

18. showed that she had personally incurred a medical bill of \$170 on account of her injuries. The court charged the jury in one of the instructions of which complaint is made, that, if they found for the plaintiff, in estimating her damages, they might take into account the amount of money she had been compelled to expend, if any, in attempting to cure herself. It appears that she was a married woman, but, under the averments of the complaint and the proof adduced in support of the same, the instruction was proper. Ordinarily the husband is chargeable with the payment of the medical bills of the wife, but he is not so chargeable under all circumstances, and even in cases where the husband may be legally liable for such debts, that fact will not deprive the wife of the right and power to bind herself therefor, if she chooses to do so. If appellee personally contracted to pay these bills, as alleged and proved, she may recover the same, in case she has a right of recovery for the physical injury to which they were incident. *Nelson v. Spaulding* (1895), 11 Ind. App. 453.

It appears from the evidence that there was no sidewalk along East Tenth street where the accident occurred, but the space intended for a sidewalk was covered with mud and gravel thrown from the street in making excavations for street improvements. There was a space of eight feet between the south rail and the curb, covered with melting snow and ice from six to fourteen inches in depth, unbroken either by pedestrians or vehicles. Pedestrians had been and were using the space between the rails in traveling east or west along that part of the street. Two other persons besides appellee were so using the street in that vicinity, at the time of the accident. The track westward was straight and substantially level for half a mile. The day was clear

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and the sun shining. The car approached at a speed of from twenty to thirty miles per hour, without sounding the gong or giving any warning, and ran from one hundred eighty-five to two hundred feet, as given by one witness, after striking appellee before it could be stopped. No reason was advanced by the motorman for his failure to observe appellee sooner than he did. It is apparent from these conditions that the motorman was required to be on the lookout for pedestrians using the track, and to have his car under such control as to avoid collisions under ordinary circumstances. In the exercise of ordinary care he would have discovered appellee and her manifest peril and apparent unconsciousness of danger when far away, and by the exercise of like care thereafter he could have given her due warning or stopped the car and avoided the accident.

The motorman testified that he observed appellee talking to Mr. Patterson, and that she stepped from the side of the track immediately in front of the car when it was

19. within fifteen feet of her. The jury did not accept this explanation, and we cannot disturb their conclusion upon the weight of the evidence. The verdict is sustained by evidence, and is not contrary to law, and no error was committed in overruling appellant's motion for a new trial.

The judgment is affirmed.

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1168	645

VINNEDGE v. THE STATE.

[No. 20,889. Filed November 27, 1906.]

1. **INDICTMENT AND INFORMATION.**—*Statutes.*—*Charging in Language of.*—*When Sufficient.*—Where a statute in defining a crime sets out all of the elements thereof, it is sufficient for the indictment to follow the language thereof, but where the statute omits an element of the crime, or has been narrowed by judicial construction so that an indictment in the language thereof would be uncertain, a charging in the language of the statute is insufficient. p. 417.

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2. INDICTMENT AND INFORMATION.—*Inferences*.—An indictment charging facts only by inference is insufficient. p. 418.
3. EMBEZZLEMENT.—*Elements*.—*Trespass*.—Embezzlement, as distinguished from larceny, does not include the element of trespass in obtaining the possession of the money or thing appropriated. p. 418.
4. SAME.—*Possession*.—*How Obtained*.—Under §2022 Burns 1901, §1944 R. S. 1881, to constitute embezzlement, the money appropriated must come into defendant's possession by virtue of his employment. p. 418.
5. INDICTMENT AND INFORMATION.—*Form*.—*Embezzlement*.—An indictment for embezzlement charging that defendant was an employe "and as such employe then and there had control and possession of" §98.25, the property of his employer, is insufficient, since it fails to show by a direct allegation that his possession was by virtue of his employment. p. 419.
6. EMBEZZLEMENT.—*Larceny*.—*Statutes*.—The statute defining embezzlement (§2022 Burns 1901, §1944 R. S. 1881) is supplemental to that defining larceny (§2006 Burns 1901, §1933 R. S. 1881), and the two do not overlap. p. 420.
7. SAME.—*Proof of Larceny*.—A defendant cannot be convicted of larceny where the proof shows embezzlement. p. 420.
8. CRIMINAL LAW.—*Crimes*.—*Statutory*.—All crimes in Indiana are statutory; and the defendant must be prosecuted and convicted under some certain statute. p. 420.
9. LARCENY.—*Embezzlement*.—*Possession*.—Where a servant has a mere naked possession or control of the money appropriated, and occupies no trust relation thereto, his appropriation of his employer's money constitutes larceny and not embezzlement. p. 420

From Madison Circuit Court; *H. J. Paulus*, Special Judge.

Prosecution by the State of Indiana against Llewellyn H. Vinnedge. From a judgment of conviction, defendant appeals. *Reversed*.

Bagot & Bagot, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

GILLETT, J.—Appellant, having been convicted of the crime of embezzlement, appeals to this court, and assigns error the overruling of his motion to quash the indict-

ment. Omitting the formal parts, that pleading reads as follows: "That on or about November 23, 1903, at and in the county of Madison, State of Indiana, one Llewellyn H. Vinnedge was then and there an employe of the American Steel & Wire Company, a corporation, and as such employe then and there had control and possession of ninety-eight and twenty-five hundredths (\$98.25) dollars in money, of the value of ninety-eight and twenty-five hundredths (\$98.25) dollars, the property of said American Steel & Wire Company, a corporation, to the possession of which said money said American Steel & Wire Company was entitled; that said Llewellyn H. Vinnedge while in the employ of said American Steel & Wire Company, a corporation, and in the possession and control of said money as aforesaid, did then and there unlawfully, feloniously, and fraudulently, without the consent of said American Steel & Wire Company, a corporation, purloin, secrete, embezzle, and appropriate to his own use all of said money."

It is contended by counsel for appellant that the access, control, or possession which the statute (§2022 Burns 1901, §1944 R. S. 1881) refers to is an access, control, or

1. possession which is had by virtue of the employment, and that because of the omission of an allegation to that effect the motion to quash should have been sustained. The Attorney-General, on the other hand, contends that it is sufficient to follow the language of the statute in charging the crime of embezzlement, and also that the facts pleaded are sufficiently certain to preclude any other reasonable inference than that the money came into appellant's hands by virtue of his employment.

While it is true that statutory crimes may be charged in the language of the statute, where the words of the statute itself directly and expressly, and without any uncertainty or ambiguity, set forth the elements of the offense, yet this is not the rule where the pursuing of the words of the statute would create uncertainty as to the nature of the charge,

or where, owing to a narrowing of the statute by judicial construction, a charging of the facts would not, owing to some other element which is involved, state an offense. *Johns v. State* (1902), 159 Ind. 413, 59 L. R. A. 789; *Stropes v. State* (1889), 120 Ind. 562; *State v. Welch* (1882), 88 Ind. 308; *Schmidt v. State* (1881), 78 Ind. 41; *Manheim v. State* (1879), 66 Ind. 65. It was said in *United States v. Carll* (1881), 105 U. S. 611, 26 L. Ed.

1135: "The fact that the statute in question, read

2. in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." The same idea was expressed by this court in *Bates v. State* (1869), 31 Ind. 72, where it was said: "Law may be construed according to the evident intent and purpose of the legislature, but an indictment cannot be thus modified."

It is a well-known fact in the history of the criminal law that the offense of embezzlement was created to cover a class of cases in which the act of the wrongdoer

3. did not involve the element of a trespass, owing to the fact that the possession was in him.

Construing the statute in question in the light of the common law, and keeping in mind the character of the offense of larceny, it becomes evident that, in de-

4. nouncing the offense of embezzlement, it was the legislative intent to make the element of access, control, or possession such an access, control, or possession as was obtained or had by virtue of the employment. It has been said that the purpose of embezzlement statutes is to protect employers against the frauds of those in whom they have confided, and that where this element of confidence does not exist the statutes do not apply. 2 Bishop, Crim. Law (8th ed.), §352.

In *Colip v. State* (1899), 153 Ind. 584, 74 Am. St. 322, this court, in discussing the statute here involved, said:

“The access to, control, or possession of property of

5. the servant or employe intended by the statute, is such access to, control, or possession as arises from the nature of the employment with reference to the particular article of property feloniously appropriated. Something more than mere physical access, or opportunity to approach to the thing, is required. There must be a relation of special trust in regard to the article appropriated, and it must be by virtue of such trust that the servant has access to, or control, or possession of it.” This holding was followed in *State v. Winstandley* (1900), 155 Ind. 290, wherein it was indicated that the indictment there under consideration was properly quashed because of the omission to allege that the defendants had access to, control, or possession of the money appropriated by virtue of their employment. In *State v. Winstandley* (1900), 154 Ind. 443, the court quoted with apparent approval the following statement concerning the requirement of an indictment for embezzlement: “It must be directly and positively alleged that the property came into the defendant’s possession and was held by him by virtue of his being a servant, agent, bailee, trustee, or officer, as the case may be.”

It is, however, argued by the Attorney-General that the charge that appellant “as such employe then and there had control and possession of” the money is sufficient to show that appellant’s possession and control was by virtue of his employment. It so happens that in *Ritter v. State* (1887), 111 Ind. 324, this court was at the pains to state its doubt concerning the sufficiency of an indictment which was in practically the same language as is employed in the accusation before us; but, as the point was not made, it was left undecided. We meet the question now, and after careful consideration we conceive it to be our duty to resolve what was thus left in doubt into a definitive ruling that such an allegation is insufficient.

In concurrently enacting a larceny (§2006 Burns 1901, §1933 R. S. 1881) and an embezzlement statute (§2022, *supra*), we are of opinion that it was the purpose of

6. the lawmaking power to make the latter statute supplemental to the former; at least this should be the construction so far as the language of the embezzlement statute will reasonably admit of it. These denouncements should not be construed as overlapping. 1 Wharton, Crim. Law (10th ed.), §1009. If for no other reason, the fact that the penalty for embezzlement is more severe is a sufficient reason for denying the State the right, as a mere matter of election, to prosecute for the crime upon which attends the heavier burden of punishment. 2 Bishop, Crim. Law (8th ed.), §329. It was held in *Jones v. State* (1877), 59 Ind. 229, that where the evidence shows the
7. offense to have been embezzlement, there can be no conviction of larceny. In line with this is *Montgomery v. State* (1881), 80 Ind. 338, 41 Am. Rep. 815, where it was said: "It is important to keep in mind that in Indiana there are no other crimes than such as are defined by statute. As all crimes are statutory, all
8. prosecutions should be under the statute by which the offense is defined and the punishment prescribed."

Where there is at most but a naked possession or control—that is, a bare charge—or where the access consists of a mere physical propinquity as an incident of the em-

9. ployment, the felonious appropriation should be regarded as larceny. The reference in the embezzlement statute to officers, agents, attorneys, clerks, servants, and employes is plainly indicative of the intent to limit the denouncement of the statute to cases in which such persons have, as an element of their employment, a special trust concerning the money, article, or thing of value that involves an actual possession thereof or a special right of access to or control over the same. This requirement would

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not be satisfied, as we may indicate by way of illustration, by the mere control, possession, or physical opportunity of access, which a watchman in charge of a store might have. As before indicated, the relationship contemplated by the statute is one of special trust and confidence; a relationship in which there inheres, either for the particular transaction or for all purposes, a special right of access to, control, or possession of, the money, article, or thing of value which is appropriated. And so here, the charge that the defendant had control and possession of the money as an employe falls short of showing that there inhered in his employment the right to such control and possession. It is therefore our opinion that the court below erred in overruling the motion to quash.

Judgment reversed, with an instruction to quash the indictment, and for further proceedings not inconsistent with this opinion.

JULIANA v. THE STATE.

[No. 20,943. Filed November 27, 1906.]

1. **APPEAL AND ERROR.**—*Affidavits.*—*Bill of Exceptions.*—Affidavits filed in the trial court in opposition to the appointment of a certain attorney as special judge, which are not contained in a bill of exceptions, are not a part of the record on appeal. p. 422.
2. **COURTS.**—*Judges.*—*Special.*—*Change of Venue.*—Under §1838 Burns 1901, §1769 R. S. 1881, the defendant in a criminal case has a right to a change of judge upon the filing of an affidavit alleging the bias and prejudice of such judge against him. p. 424.
3. **SAME.**—*Judges.*—*Special.*—*Appointment.*—The regular judge, upon a change of judge, may appoint some other judge, or some attorney in good standing, at his discretion, to try the cause. p. 424.
4. **SAME.**—*Judges.*—*Special.*—*Competency.*—*Public Policy.*—Public policy requires that special judges appointed to try causes shall be competent and disinterested. p. 424.

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5. **ATTORNEY AND CLIENT.**—*Disclosures to, Before Employment.*—*Confidential Character of.*—Disclosures made by defendant's wife to an attorney, with a view to his employment, are confidential and privileged. p. 425.
6. **COURTS.**—*Judges.*—*Special.*—*Competency.*—An attorney, consulted by defendant's wife with a view to his employment and who examined the indictment and consulted with the defendant, but who was not retained, is not competent to sit as a special judge in defendant's case. p. 425.
7. **SAME.**—*Judges.*—*Freedom from Prejudice.*—Judges should avoid even the appearance of bias or prejudice in the trial of causes. p. 427.
8. **SAME.**—*Judges.*—*Interest.*—*Relationship.*—Judges who have even a remote interest in the cause on trial, or who are even remotely related to a party, should, of their own accord, vacate the bench and appoint a special judge. p. 427.

From Criminal Court of Marion County (34,797); *Wilborn Wilson*, Special Judge.

Prosecution by the State of Indiana against Michael Juliana. From a judgment of conviction, defendant appeals. *Reversed.*

E. W. Little, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

MONTGOMERY, C. J.—Appellant was convicted upon a charge of burglary and grand larceny.

The first alleged error presented for consideration is the appointment of Wilborn Wilson, an attorney, as special judge, over the objection of appellant. A change of

1. venue was taken from the regular judge of the Criminal Court of Marion county, and Mr. Wilson was appointed to try the cause. Appellant objected at the time to the appointment, and filed affidavits setting forth the grounds of his objection. It is insisted by the State that these affidavits must be disregarded, because not brought into the record by a bill of exceptions. This contention must be sustained. *Compton v. State* (1883), 89 Ind. 338; *Siebert v. State* (1884), 95 Ind. 471; *Ewbank's*

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Manual, §26. The court, however, heard oral evidence upon the question raised by appellant's objection to the appointment of Mr. Wilson as special judge, and this evidence has been properly brought into the record by a special bill of exceptions.

Appellant's wife testified that after her husband's arrest she went to Mr. Wilson's office and talked to him about defending appellant—told him how it was, and what he was arrested for, and wanted to know his fee. Mr. Wilson telephoned over to the criminal court, and learned that appellant was arrested for stealing goods. He asked if she had any money, and she said, "No," and he said he would go and see about it, and see appellant, and see how hard he would have to fight, before fixing his charge.

Appellant testified that Mr. Wilson came to the jail and told him that his wife had been over talking to him, and asked if he had an attorney, and said he would like to have the case, and, believing that his father had already hired him, appellant said it would be alright.

Mr. Wilson testified that he had no employment, but that Mrs. Juliana came to his office and said her husband had been arrested for receiving stolen goods and had no attorney; that she did not appear to know whether he had been tried in the police court, but spoke of the grand jury, and he then called up the criminal court and was informed that appellant had been indicted, and was charged with grand larceny and burglary; that he then went to the court-house and examined the indictment, and there saw that Mr. Little appeared as attorney for appellant, and then went to the jail and asked appellant whether he had an attorney, and he said "yes," and that his father had employed one, and he did not care to employ an additional attorney in the case; that no fee was agreed upon, but Mrs. Juliana said she would get the money for the fee from her friends if he would let her know the amount, but, on being informed that

Mr. Little was employed, the matter was dropped. He did not go into the details of the case, and on being asked as to his experience told Mrs. Juliana that his success had been good. Mr. Wilson further stated that he had not formed or expressed an opinion and had no interest in the case.

Upon these facts appellant objected to the appointment of Mr. Wilson as special judge, and the court overruled such objection and appellant excepted.

A change of venue from the judge of a court may be demanded upon an affidavit alleging his bias and

2. prejudice against the defendant, as was done in this case. §1838 Burns 1901, §1769 R. S. 1881.

When a change of venue has been taken from the judge, he may call any other judge of any circuit, criminal, superior, or other court of general jurisdiction, or

3. any judge of the Supreme Court, to preside in such case and try the same; and, if, in such case, it shall be difficult, in the opinion of the court, for any cause, to procure the attendance of any such judge, the court may, to prevent delay, appoint any competent and disinterested attorney of the State, in good standing, to act as judge in said cause. §1839 Burns 1901, §1770 R. S. 1881. The selection of an attorney instead of a regular judge of some other court rests in the discretion of the judge from whom the change is taken, and no claim in this case is made that the judge abused his discretion in this respect, but the question presented is whether the attorney chosen was "competent and disinterested" within the meaning of the law. The

question presented is important, and affects not

4. only the rights of this appellant, but also the interests of the State and of society in general. The State is gravely concerned in maintaining the impartiality and disinterestedness of its courts.

It was made to appear that the attorney appointed as special judge in the case had been approached and consulted,

with a view to employment as an attorney in the

5. case, by the wife of appellant. What was said between the wife and the attorney in that connection is but meagerly given, but it was privileged, and ordinarily cannot be inquired into or revealed. No contract of employment was closed at the time, for the want of sufficient facts upon which to fix the fee. The attorney, with a view to employment and to a proper adjustment of his

6. charges, examined the indictment, and held an interview with appellant. The relation existing between appellant and the attorney during this interview was confidential, and what was said was and should be privileged. Their statements as to what was said are not in accord, but it is immaterial whether his proffered services as such attorney were accepted or declined by appellant, or whether he dropped the matter because a particular attorney already appeared of record as appellant's attorney in the case. The question under consideration cannot be decided by the test that no employment was actually consummated, nor by an inquiry as to what particular facts concerning his defense were communicated to the attorney by the appellant and his wife, in a confidential way. The attorney voluntarily set about to ascertain the facts necessary to a defense of the accused, and put himself into confidential relations with the appellant and one speaking in his interests, and upon this showing he should be held incompetent to sit as judge in the case, without attempting to determine the exact limits of his knowledge of the facts involved or their probable effect upon his mind. If a full disclosure were made by a defendant under the circumstances shown, as might and should be done, some bias for or against him might naturally result. No man with a like opportunity to become familiar with the facts would knowingly be accepted to serve as one of a panel of twelve jurors. It is equally clear that the one man who may be the sole judge of the guilt of the accused should be held incompetent to

preside upon the trial of the case. If, as stated by the attorney, his services were declined in favor of another, and possibly a rival in business, the chances of a lingering bias against the accused might be increased. If, on the other hand, he was much impressed by the facts communicated tending to establish innocence, he might be biased against the cause of the State. In either case, if the facts were known to both parties, neither could feel that confidence in and respect for the court which it is the policy of the law to secure and maintain. The principle applicable has been forcibly and aptly stated in the case of *Oakley v. Aspinwall* (1850), 3 Comst. (N. Y.) 547, in which it was said: "The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. * * * Mankind are so agreed in this principle, that any departure from it shocks their common sense and sentiment of justice. * * * It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the State, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

In the case of *State, ex rel., v. Hocker* (1894), 34 Fla. 25, 15 South. 581, 25 L. R. A. 114, the supreme court of Florida said: "The law which disqualifies a judge who has been of counsel in the case intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent. The great principle should

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not have a narrow or technical construction, but should be applied to all classes of cases where a judicial officer is called upon to decide controversies between the people." See, also, *Hall v. Thayer* (1870), 105 Mass. 219, 7 Am. Rep. 513.

This court has very appropriately said: "Judges are by no means free from the infirmities of human nature, and, therefore, it seems to us, that a proper respect for

7. the high positions they are called upon to fill should induce them to avoid even a cause for suspicion of bias or prejudice, in the discharge of their judicial duties." *Joyce v. Whitney* (1877), 57 Ind. 550, 554. Other illustrative cases in this State are: *Leonard v. Blair* (1877), 59 Ind. 510; *Fechheimer v. Washington* (1881), 77 Ind. 366; *Chicago, etc., R. Co. v. Summers* (1887), 113 Ind. 10; *Waterman v. Morgan* (1888), 114 Ind. 237; *Lillie v. Trentman* (1891), 130 Ind. 16; *Winters v. Coons* (1904), 162 Ind. 26.

In the case of *Moses v. Julian* (1863), 45 N. H. 52, 84 Am. Dec. 114, a great many authorities upon the general subject of the disqualification of judges are gathered, and the court, borrowing in substance from a writer cited, said: "The most perfect integrity that can be in judges is no hindrance why the parties, who have causes depending before them, may not challenge them, or except against them, and why they ought not, of their own accord, to abstain from hearing causes in which they may have some interest, or where there may be some just ground for suspecting them, * . * for although a judge may be above the weakness of suffering himself to be biased or corrupted, and may have resolution enough to render justice against his own relations, and in the other cases where it may be lawful for the parties to except against the judges, yet they ought to mistrust themselves, and not draw upon themselves the just reproach of a rash proceeding." The declarations quoted were made in cases in-

volution of the action of judges regularly chosen for the position, and assuredly the doctrine should not be less strict in case of the appointment of an attorney as special judge, with the entire bar of the State from which to choose.

It is our conclusion that Mr. Wilson was upon the facts disclosed incompetent to act as judge in the case, and that the court erred in making his appointment over the objection.

The judgment is reversed, and the cause is remanded with instructions to set aside the appointment of the special judge, and for further proceedings.

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AMERICAN EXPRESS COMPANY v. THE STATE.

[No. 20,564. Filed November 27, 1906.]

APPEAL AND ERROR.—*Answer.*—*Sustaining Demurrer to Paragraph.*—*Facts Provable Under Another.*—It is harmless error to sustain a demurrer to a paragraph of answer whose facts are provable under another paragraph.

From Monroe Circuit Court; *James B. Wilson*, Judge.

Action by the State of Indiana against the American Express Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

J. E. Henley and *Baker & Daniels*, for appellant.

Robert G. Miller, *Arthur M. Hadley* and *Brooks & Brooks*, for appellee.

MONKS, J.—This action was brought by the State against appellant to recover the penalty of \$500 for an alleged violation of certain provisions of the act of March 7, 1901 (Acts 1901, p. 149, §§3312b-3312f Burns 1901). An answer in six paragraphs was filed. Appellee's demurrer for want of facts was sustained to the second, third, fourth, fifth, and sixth paragraphs of said answer.

A trial of said cause resulted in a special finding and judgment in favor of appellee for \$500 and costs.

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If the second, fifth, and sixth paragraphs were each sufficient to withstand the demurrer for want of facts, a question we need not and do not decide, it was because each of said paragraphs was good as an argumentative denial. All the evidence, if any, admissible under said paragraphs of answer was admissible under the first paragraph of said answer, which was a general denial. It follows that the error, if any, in sustaining the demurrer to said second, fifth, and sixth paragraphs of answer was harmless. *Tomlinson v. Bainaka* (1904), 163 Ind. 112, 115, 116, and cases cited.

The questions presented in this case are substantially the same as those involved and decided in *Adams Express Co. v. State* (1903), 161 Ind. 328; *American Express Co. v. Southern Ind. Express Co.* (1906), *ante*, 292, and *American Express Co. v. State* (1906), *ante*, 319, and upon the authority of those cases this case is affirmed.

JOHNSON ET AL. v. KNUDSON-MERCER COMPANY.

[No. 20,859. Filed November 27, 1906.]

1. PLEADING.—*Reply.—Judgment.—Res Judicata.—Essentials.*—A reply of former adjudication must show (1) that the former judgment was rendered by a court having jurisdiction, (2) that the matter in issue in the present suit was or might have been adjudicated in such former suit, (3) that the parties to the issue were the same, and (4) that the judgment rendered was on the merits. p. 431.
2. SAME.—*Reply.—Sufficiency.—Judgment.—Res Judicata.—Parties.—Identity.*—To an answer of want of consideration of the note sued upon, a reply showing that the present defendant was "one of the defendants" in a former suit; that an issue in such suit involved the question whether such note was founded upon a sufficient consideration; that such issue was decided in favor of the present plaintiff, sufficiently shows that the parties were the same. p. 432.
3. JUDGMENT.—*Res Judicata.—Subject-Matter.—Parties.—Issues.*—To constitute a prior judgment *res judicata* the subject-

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matter of the particular issue in the pending suit must be the same as in the prior suit, and the parties, or their privies, to the present suit must have been adverse parties to such issue in the prior suit. p. 432.

4. **JUDGMENT.**—*Res Judicata.*—*Issues.*—*Test.*—To constitute a prior judgment *res judicata* the particular issue in the present suit must have been determined in the prior suit, the test being whether the same evidence would sustain both the present and former issues, difference in the form of the suits being immaterial. p. 432.
5. **PLEADING.**—*Reply.*—*Res Judicata.*—*Parties.*—*Bills and Notes.*—*Consideration.*—*Principal and Surety.*—A reply of former adjudication, against the principal and surety on a note, showing that the question of the consideration of the note sued upon had been in issue between the present plaintiff and the principal on said note and decided in favor of the present plaintiff, is good as against such principal and his surety, where the reply shows that such other defendant was a surety. p. 433.
6. **SAME.**—*Reply.*—*Former Adjudication.*—*Subject-Matter.*—*Identity.*—To an answer of want of consideration of the note sued upon, a reply that such issue was litigated and determined in plaintiff's favor, on the merits, in a prior suit, sufficiently identifies the subject-matter of the former suit. p. 433.
7. **SAME.**—*Reply.*—*Former Adjudication.*—*Record of Former Suit.*—A reply of former adjudication does not need to set out a copy of the record of the former suit. p. 434.

From Huntington Circuit Court; *J. Fred. France*, Special Judge.

Action by the Knudson-Mercer Company against Albert G. Johnson and another. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

T. G. Smith, C. W. Watkins and *A. G. Johnson*, *in pro. per.*, for appellants.

W. D. Hamer, for appellee.

HADLEY, J.—Appellee sued appellants for a balance due on a promissory note. The answer sets up that the note,

in excess of the amount already paid thereon, was without consideration. To this answer the plaintiff replied that "the consideration of the note sued on in this action was an issue in a suit in said Huntington Circuit Court, being cause No. 8,864, wherein this plaintiff was the plaintiff, and the defendant Albert G. Johnson one of the defendants therein; that said suit involved an accounting of a series of transactions between this plaintiff and the defendant Albert G. Johnson; that said Albert G. Johnson claimed and was awarded credit in that suit for the note sued on in this action, and the consideration of said note was made an issue in said suit between this plaintiff and said defendant Albert G. Johnson, and said issue was heard and determined in said cause No. 8,864 in favor of the plaintiff, and on March 29, 1904, judgment was rendered in said cause in favor of this plaintiff on the merits of said issue, and said issue is in full force and remains unappealed from; that Elias H. Coss, a defendant in this action, is surety only for the defendant Albert G. Johnson." To this paragraph of the reply defendant's demurrer was overruled, and this action of the court presents the only question for decision.

Under the approved practice in this State a plea of former adjudication must show: (1) That the former judgment was rendered by a court of competent

1. jurisdiction; (2) that the matter now in issue was, or might have been, determined in the former suit; (3) that the particular controversy adjudicated in the former suit was between the parties to the present suit; (4) that the judgment in the former suit was rendered on the merits. 1 Works' Practice, §605; 9 Ency. Pl. and Pr., 619; *Jones v. Vert* (1889), 121 Ind. 140, 16 Am. St. 379; *Chicago, etc., R. Co. v. State, ex rel.* (1899), 153 Ind. 134; *State, ex rel., v. Page* (1878), 63 Ind. 209, 212;

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2 Van Fleet, Former Adjudication, p. 1327; 5 Current Law, 1516.

Appellant Johnson's first objection to the reply is that it does not show that the parties in the former suit were the same as in this. The averment is that "the defend-

2. ant Albert G. Johnson, of this suit, was one of the defendants" in the former suit. But this is not all that is averred. The plea continues, "that said suit involved an accounting of a series of transactions between the plaintiff and said defendant Johnson, wherein Johnson claimed and was awarded credit in that suit for the note sued on in this action, and the consideration of said note was made an issue in said suit between this plaintiff and said Johnson," and that codefendant Coss was only surety on said note for Johnson. This was sufficient.

The expression often found in the books, that the subject-matter of the two suits must be the same, and the controversy between the same parties or their

3. privies, is true in this State with some limitation.

The subject-matter of the particular issue must be identical, and the parties or their privies to the pending suit must have been adverse parties to the same issue in the former suit, but it is not important that the parties to the two suits shall be the same. *Richardson v. Jones* (1877), 58 Ind. 240; 1 Works' Practice, §605; *Wilson v. Buell* (1889), 117 Ind. 315; *Board, etc., v. Beaver* (1901), 156 Ind. 450, and cases cited; *Davenport v. Barnett* (1875), 51 Ind. 329, 333; *Finley v. Cathcart* (1898), 149 Ind. 470, 63 Am. St. 292; *State, ex rel., v. Krug* (1884), 94 Ind. 366, 370; *Greenup v. Crooks* (1875), 50 Ind. 410.

Neither is it essential to a sufficient plea of former recovery that the plea should show that the former suit

4. was the same. It is enough to show that the particular controversy was in issue, and judicially de-

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terminated between the parties to the present suit. "The best and most invariable test as to whether a former judgment is a bar," says a distinguished author, "is to inquire whether the same evidence will sustain both the present and the former action. If this identity of evidence be found it will make no difference that the form of the two actions is not the same." 1 Freeman, Judgments (4th ed.), §259, and many cases collated. See, also, *Hereth v. Yandes* (1870), 34 Ind. 102; *Campbell v. Cross* (1872), 39 Ind. 155; *Reeves v. Plough* (1874), 46 Ind. 350; *Turner v. Allen* (1879), 66 Ind. 252; *Green v. Glynn* (1880), 71 Ind. 336; *McCarty v. Kinsey* (1900), 154 Ind. 447; *Wilson v. Buell*, *supra*.

The weakness suggested by the averment that the defendant Johnson was one of the defendants in the former case is overcome by the subsequent allegation that

5. the note sued on in the present action and the consideration thereof were in issue in said former suit between the plaintiff and said Johnson, and decided in favor of this plaintiff. The appearance of the name of Elias H. Coss on the note, and as a defendant, is sufficiently explained by the averment that Coss was surety, only, for Johnson on said note. Johnson being the principal, he was the real party to the issue. *Andreas v. School Dist.* (1904), 138 Mich. 54, 100 N. W. 1021; 5 Current Law, 1510.

A further objection to the reply is that the subject-matter of the former suit is not sufficiently identified. We

think otherwise. The present cause is an ordinary

6. action on a promissory note. The answer is no consideration. The reply is that the note in suit and the consideration thereof were in issue in the former suit, and said issue was heard in said cause and determined in favor of this plaintiff, and judgment rendered thereon in favor of the plaintiff on the merits.

It is also contended that the reply should have been accompanied with the record of the former suit.

7. This was unnecessary. *McCarty v. Kinsey, supra*; *Wilson v. Vance* (1877), 55 Ind. 584; *Richardson v. Jones, supra*.

We think the reply was good.

Appellee has filed no brief.

Judgment affirmed.

KUNKLE v. ABELL ET AL.

[No. 20,891. Filed December 11, 1906.]

1. **CONSTITUTIONAL LAW.—Intoxicating Liquors.—License.—Remonstrance.**—The act of 1905 (Acts 1905, p. 7, §7283i Burns 1905), providing for the prevention of the granting of a license in townships or city wards by the filing of a remonstrance by a majority of the voters of such townships or city wards, is constitutional. *Cain v. Allen*, 168 Ind. —, followed. p. 436.
2. **STATUTES.—Reenactment of, after Judicial Construction.—Presumptions.**—The reenactment of a provision in an act, after a judicial construction has been given thereto, raises a presumption that the legislature intended the reenacted provision to receive the same construction as the prior one. p. 437.
3. **SAME.—Intoxicating Liquors.—Remonstrance.—Number of Voters.—How Determined.**—The act of 1905 (Acts 1905, p. 7, §7283i Burns 1905), providing that the number of voters necessary to a successful remonstrance against the granting of a license to retail intoxicating liquors shall be a majority of the aggregate number of votes cast for any of the candidates "for any office at the last election preceding the filing of such remonstrance," refers to the last preceding general and not special election. p. 438.
4. **SAME.—Intoxicating Liquors.—Remonstrance.—Number of Voters Required.**—Under §7283i Burns 1905, Acts 1905, p. 7, the number of remonstrants necessary successfully to oppose the granting of a license to retail intoxicating liquors consists of the majority of the aggregate votes received by all candidates for any office voted for at the last general election held in the township or city ward. p. 438.

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5. INTOXICATING LIQUORS. — *License. — Application. — Remonstrance. — Practice.*—An applicant for a license to retail intoxicating liquors is entitled to a trial as to the sufficiency of his application and as to the validity of a remonstrance filed against the granting of such license, though such remonstrance was filed at a previous term of the commissioners' court and by them adjudged sufficient to bar all applicants. p. 440.

From Pike Circuit Court; *E. A. Ely*, Judge.

Application by John E. Kunkle, against which Theodore Abell and others remonstrate. From a judgment for remonstrators, the applicant appeals. *Reversed.*

E. P. Richardson and *A. H. Taylor*, for appellant.

Samuel E. Dillin, *J. W. Brumfield* and *Frank Ely*, for appellees.

JORDAN, J.—This proceeding was instituted by appellant's applying to the board of commissioners of Pike county, Indiana, at its regular October session, 1905, for a license to sell intoxicating liquors in the town of Petersburg, Washington township, in said county. It is disclosed that three days before the beginning of the June session, 1905, of the board of commissioners of said county, a general remonstrance under section nine of the Nicholson law, as amended by the act of 1905 (Acts 1905, p. 7, §7283i Burns 1905), purporting to be signed by a majority of the legal voters of the township, was filed with the county auditor. This remonstrance was against granting a license to any and all persons to sell intoxicating liquors in said township. At said June session the board of commissioners, in the absence of the making of any application at that session for a license to sell intoxicating liquors in said township, assumed jurisdiction over the remonstrance in question, and thereupon adjudged that it had been seasonably filed, and at the time of its filing had been signed by a majority of the legal voters of Washington township. It is also disclosed that a remonstrance against appellant, as authorized by §7278 Burns 1901, §5314 R.

S. 1881, alleging his unfitness to be intrusted with a license to sell intoxicating liquors, was filed at the October term, 1905, of the board of commissioners, but there is nothing in the record to show that it was given any consideration. Appellant's application herein for a license was at said October session, 1905, denied by the board of commissioners, solely upon the grounds that the filing of the general remonstrance in question, and the judgment of the board entered thereon at the June session, 1905, deprived the board of all jurisdiction in the matter of an application for license thereafter made. From this decision appellant appealed to the Pike Circuit Court. The latter court appears to have concurred in the ruling of the board of commissioners, and upon the same grounds held and adjudged that the application be dismissed, and that appellant take nothing by his proceedings, and rendered judgment against him for costs. From this judgment he has appealed to this court, and under his assignment of errors calls in question the ruling of the court in dismissing his application. He also assails the constitutional validity of the amendatory act of 1905, *supra*, and asks that under the facts in this case the meaning of the phrase or provision therein, "at the last election preceding the filing of such remonstrance," be construed.

The constitutional validity of the act in question and the right of the board of commissioners, under the circumstances, to assume jurisdiction over the remon-

1. strance at its June session, 1905, were questions which were considered and determined in the appeal of *Cain v. Allen* (1907), 168 Ind. —, and the holding therein upon these questions must rule in the case at bar. It appears from the facts herein that on May 20, 1905, a special election was held in the first congressional district, of which Pike county forms a part, for the election of a congressman to fill a vacancy which had occurred since the general election in 1904. The greatest aggregate vote cast

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at said special election in Washington township, in said county, for the candidates for the office of representative in the congress of the United States for said district was 813. It is disclosed that at the general November election, 1904, the greatest aggregate vote cast in said township for candidates for any office was for the several candidates for Governor, and amounted to 1,161 votes. The remonstrance, as shown, was signed at the time of its filing by 439 persons, who purported to be legal voters. It is apparent that this number was a majority of 813, the greatest aggregate vote cast in said township at said special election for candidates for congress, but it falls short of being a majority of 1,161, the greatest aggregate vote cast at the general November election in 1904 for all of the candidates for Governor. Counsel for appellant, under the circumstances, insist that under section nine as amended the 1,161 votes is the standard by which the number of voters necessary to sign the remonstrance must be measured or tested. Counsel for appellees, however, contend that the election referred to in section nine as amended means any election, either general or special, at which some public officer or officers are to be elected. It is evident, therefore, that under the facts and contention of the respective counsel the question is involved in regard to the interpretation of the meaning of the phrase or provision "at the last election preceding the filing of such remonstrance." This same phrase was contained in section nine as it originally stood, and, prior to its amendment by the act of 1905, *supra*, had been construed by this court in the appeal of *Massey v. Dunlap* (1896), 146 Ind. 350, 357.

In the latter case, in placing a construction or interpretation on the provision "at the last election preceding the filing of such remonstrance," we held that in a

2. case where an application was made for license to sell intoxicating liquors at some designated place in a township beyond the limits of an incorporated city there-

in, the election meant and intended by the legislature was the last general November election preceding the filing of the remonstrance; that in case of an application to sell in a city ward, then the election meant or contemplated was the last general city election preceding the filing of the remonstrance. The rule is well settled that where a statute, or any part thereof, has been construed or interpreted by the courts of a state, and is thereafter reenacted by its legislature in the same terms, or in substantially the same language, for the same purpose and object, it will be presumed that the legislature intended that the law so reenacted should bear the same interpretation or construction as was accorded by the court to the statute, or provision thereof, as the same stood prior to the time it was reenacted, unless the contrary is clearly disclosed by the language of the statute. *Hilliker v. Citizens St. R. Co.* (1899), 152 Ind. 86; *Board, etc., v. Conner* (1900), 155 Ind. 484, and authorities cited; *Cain v. Allen, supra*.

Guided by this well-recognized canon of interpretation, we must presume, nothing to the contrary appearing, that the legislature, by inserting and reenacting under

3. the amendatory act of 1905, *supra*, the phrase or provision "at the last election preceding the filing of such remonstrance," intended that it should bear the same interpretation or construction given to it by this court in the decision of *Massey v. Dunlap, supra*. Therefore the provision in question cannot be construed to include some special election, but must be confined to a general election, as held in the latter decision.

It will be observed that by the amendatory act in question the word "greatest" was inserted before "aggregate" and the word "any" was substituted for "highest,"

4. thereby making this part of the section as amended read: "The greatest aggregate vote cast in such township or ward for the candidates for any office," instead of "the aggregate vote cast in such township or city ward

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for the candidates for the highest office," as contained in the section as originally passed by the legislature. Consequently thereunder the standard now prescribed by which the number of voters required to sign a remonstrance in a township must be tested or measured is a majority of the greatest aggregate vote cast for all candidates for any particular office at the last preceding general November election. Where an application is made for a license to sell in a township outside of an incorporated city therein, the test under the section as amended is not now confined alone to the aggregate vote cast at said general election for all the candidates for Governor or Secretary of State, as the case might be—as held in *Massey v. Dunlap, supra*—but the test must be the greatest aggregate vote cast for all candidates for any office, regardless of the rank of such office. The vote cast for candidates upon the state ticket is not alone to be the test; but if the greatest aggregate vote cast at the election is for candidates upon either the state, county, or township ticket, such vote, under the circumstances, must be the test or standard by which the required number of voters must be measured. The same test must control in the event the remonstrance filed is a special one against some particular applicant.

In case a general remonstrance is filed against the granting of a license to any person to sell intoxicating liquors in some particular ward of a city, then the number of legal voters who must sign such remonstrance, under the statute as amended, in order to make it effective, must at least constitute a majority of the greatest aggregate or combined vote cast in such ward for all candidates for any city office, regardless of the rank of such office, at the last general city election held preceding the filing of the remonstrance. If the remonstrance be a special one against granting a license to some particular applicant to sell intoxicating liquors in such ward, the required number of remonstrators must be determined or tested by the same standard. It follows,

under the circumstances, that the trial court erred

5. in dismissing appellant's application without according him a hearing in such proceeding. *Cain v. Allen, supra*. If, upon another trial, the court, upon the evidence, finds that the general remonstrance in controversy was not signed by the required number of legal voters at the time of its filing, then such remonstrance, so far at least as it concerns appellant in this case, will be of no effect, and the court can then proceed to examine and determine whether appellant had given the required notice of his intention to apply for a license. If he has, a hearing or trial should be had under his application in regard to his fitness to be intrusted with a license for the sale of intoxicating liquors at the place where he desires to sell, and also a hearing should be accorded the remonstrators, in the event they desire to press the same, upon their remonstrance filed before the board under the authority of §7278 Burns 1901, §5314 R. S. 1881. *Castle v. Bell* (1896), 145 Ind. 8; *Ludwig v. Cory* (1902), 158 Ind. 582.

For the error of the trial court in dismissing the application its judgment is reversed, and the cause remanded, with instructions to reinstate the case upon the docket, and for further proceedings not inconsistent with this opinion and the decision in *Cain v. Allen, supra*.

POMEROY ET AL. v. WIMER.

[No. 20,799. Filed June 20, 1906. Rehearing denied December 11, 1906.]

1. TRIAL.—*Instructions.—Legal Effect of Undisputed Facts.—When Question for Jury.*—An instruction setting out the facts constituting the business relations between plaintiff and defendant should not state the legal effect of such acts where different inferences could reasonably be drawn therefrom, such deduction being for the jury. p. 445.

2. **PRINCIPAL AND AGENT.—Agents' Profits.—When Belong to Principal.**—Where plaintiff employed defendant as his agent to sell his land, and, after advertising same, defendant failed to make a sale, plaintiff telling defendant after the failure that if he got hold of a piece of ground to sell on which plaintiff could apply his land as part pay to let him know; and defendant offered plaintiff a tract which he and others held for speculative purposes, telling him all about the owners and their profits before the completion of the sale, the plaintiff cannot, after effecting the sale, recover from defendant and such others their profits in the transaction on the theory that defendant was his agent, and that the others knew such fact before such sale. pp. 446, 452.
3. **SAME.—Agent Buying from, or Selling to, Himself.**—A confidential agent with power to buy and sell may not, without a full disclosure to his principal, buy from, nor sell to himself. pp. 447, 450.
4. **SAME.—Powers of Agents.—Profits.**—Where an alleged agent had no power of sale, and his employment consisted solely of introducing his principal to a proposed purchaser, the principal making or refusing to contract without let or hindrance, such alleged agent cannot, as a matter of law, be held to bear such relation to the principal as that his profits derived from the sale effected shall belong to said principal. p. 448.
5. **APPEAL AND ERROR.—Rehearing.—New Questions.**—Parties, on appeal, cannot raise new questions on a petition for a rehearing. p. 449.
6. **SAME.—Briefs.**—It is not necessary for appellant in his brief to set out causes in his motion for a new trial which are abandoned. p. 449.
7. **SAME.—Briefs.—Arrangement.**—Where the motion for a new trial and the instructions complained of are set out in a convenient place in the brief and an honest effort is shown to comply with the Supreme Court rules, such brief will be held sufficient. p. 450.
8. **PRINCIPAL AND AGENT.—Serving Two Masters.**—Where an agent's sole duty consists in bringing parties together, and they reserve the exclusive power to contract, such agent may serve both and be entitled to compensation from both, regardless of their knowledge of his relations. p. 451.
9. **SAME.—Agent's Sale to Principal.**—Where an agent's sole duty is to introduce his principal to a proposed purchaser, such agent, after disclosure of his interest, may sell directly to such principal, and be entitled also to his commission as agent. p. 452.

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From Dekalb Circuit Court; *C. W. Watkins*, Special Judge.

Action by John Wimer against James E. Pomeroy and others. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed*.

E. V. Harris, D. M. Link and Marshall, McNagny & Clugston, for appellants.

P. V. Hoffman and Brown & West, for appellee.

HADLEY, J.—In the spring of 1902 appellee owned twenty-one acres of land near the city of Auburn, known as the Fair Grounds. Appellant Pomeroy was a real estate broker located in Auburn. At the time referred to Wimer authorized Pomeroy to sell the Fair Grounds for \$1,000, and directed him to advertise the property in the local papers at his (Wimer's) expense. The price was subsequently reduced to \$750, but in August or September following, no sale having been effected, it was determined by the parties to discontinue the advertisement. Nothing was said at the time as to whether the agency should close or continue, but on separating Wimer said to Pomeroy: "If you get hold of a piece of ground to sell, for which I can turn the Fair Grounds as part pay, let me know." Appellant Esselburn, a timber buyer, having come across a farm of seventy-five acres, belonging to the Sommers heirs, that was being offered by Michael Boland, as agent, for \$30 per acre, and having on it much valuable timber, which Esselburn desired, came to an agreement with Pomeroy that they would buy an option on the farm for thirty days at \$30 per acre, and if they failed to sell it before the expiration of the option they would jointly raise the money and pay for it, and take chances on making a profitable sale afterward.

On December 9, pursuant to the agreement, Pomeroy, in his individual name, "as agent of unnamed principal,"

closed the option contract, calling for a warranty deed for the land upon the payment of the balance of \$30 per acre, within thirty days, and a forfeiture of the amount paid if the balance was not paid within that time. Appellant Weeks was to have an equal share of the profits if he succeeded in making a sale within the life of the option. Appellant Weeks had never seen the farm, but upon the request of Pomeroy, called upon Wimer, and gave him a description of the farm, as it had been given to him, and arranged to accompany Wimer out to see it. Wimer took a spade, went over the land, dug into the soil at many places, examined the timber, and within a few days sent out a timber expert to estimate its value, and then with Weeks went to Pomeroy's office December 13 and entered into a written agreement with Pomeroy for an exchange of the Fair Grounds for the Sommers farm, Wimer agreeing to give \$2,400 cash boot, and Pomeroy at the time executing the agreement as "agent of unnamed principal," and explaining to Wimer that he and others were holding the land for speculative purposes. Deeds were executed and exchanged January 12, 1903, in accordance with the contract, but before the exchange Wimer was fully informed as to the beneficiaries represented by Pomeroy and of the amount of their profits in the trade, and made no objection. In May, 1903, Wimer brought this action for damages, on the theory that Pomeroy was his agent to sell or exchange the Fair Grounds for a larger farm, and, having been instrumental in bringing about such a trade, while acting as agent, the plaintiff was entitled to the Sommers farm at the price his agent paid for it, and appellants Weeks and Esselburn, having knowledge of such agency, and having shared equally with Pomeroy in the profits of the trade, were alike and equally liable to account to him. Issues were joined by a general denial and plea of ratification. Verdict and judgment for appellee for \$886.20.

Appellants insist that they were prevented from having a fair trial by an erroneous instruction which the court gave to the jury of its own motion. It was in part as follows: "No. 2. In this case, the undisputed facts show that the defendant James E. Pomeroy was the agent of the plaintiff for the purpose of exchanging his twenty-one acres of land, known as the Fair Grounds, for a larger piece of land, said plaintiff to pay the difference, and said Pomeroy to receive a reasonable commission for his services in that behalf. It is also undisputed that, while he was such agent, the defendants Pomeroy and Esselburn discovered that Michael Boland, as agent of the Sommers heirs, had a tract of land consisting of seventy-five and forty-six hundredths acres for sale at the cash price of \$30 per acre, and that said Esselburn and Pomeroy procured a written contract or option from said Boland in the name of said Boland, as agent and attorney in fact for said Sommers heirs, and of the defendant Pomeroy, as agent for unnamed principals. * * * It is also undisputed that on December 13, 1902, after obtaining said option, the defendant Pomeroy executed a contract with the plaintiff in which said Pomeroy appeared as agent of unnamed principals, in which contract it was stated that whereas said Pomeroy had contracted with Michael Boland as agent for the Sommers heirs for the land described in said option contract, that said Wimer was to take said land at the agreed price of \$3,500, his twenty-one acres to be taken at the price of \$1,100, and the balance to be paid in cash. It is also undisputed that said contract was taken for the benefit of said Pomeroy, Weeks and Esselburn; that each was to have an undivided one-third of the profits made upon said option contract; and it is also undisputed that when said defendant entered into said contract with said Wimer for the sale of said land that he was holding said twenty-one acres as agent of the plaintiff for sale under the terms heretofore stated. * * * It is also undisputed that said

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defendants divided said \$135.20, over and above said purchase price from said Boland, among themselves; and that they also divided said twenty-one acres of land, each taking one-third thereof, or seven acres; and that said Pomeroy, before the commencement of this action, sold his seven acres of said land to Andrew Marsh. These facts being undisputed, the burden is on the defendants to show, by a preponderance of the evidence, that at the time the plaintiff entered into said contract with said Pomeroy, at the time he received his deed and paid the purchase money for the land received from Boland and conveyed his twenty-one acres to the defendant Pomeroy, he had full knowledge of all of the facts in relation to said sale, and that the land of said Sommers heirs was of the fair value of \$3,500; and that said plaintiff knew, at the time he entered into said contract, and at the time he accepted said deed from said Pomeroy for said Sommers land, and conveyed his land to said Pomeroy, all of the facts in connection with the transaction, including the fact that the defendants held an option on said land from which they could be released by forfeiting the \$5 paid, in case said plaintiff did not take said land within the time provided in said option or the extension thereof."

As shown by the record, there were but two witnesses introduced, and their testimony related to matters wholly immaterial. The plaintiff did not testify, nor give

1. his deposition, though it appears that his deposition was taken and left with his attorney. The evidence, aside from the two witnesses mentioned above, was composed solely of the contracts, deeds, and record of deeds noted in the above introductory facts, and the examination of each of the defendants, taken by the plaintiff before trial under §517 Burns 1901, §509 R. S. 1881. So the court was not wrong in stating to the jury that the facts relating to Pomeroy's agency were undisputed, so far as affected by direct evidence. But it was undoubtedly in error

in stating to the jury what those facts proved. The fundamental fact in the case for the jury to decide was the question of agency, and its character, between the plaintiff and defendant Pomeroy, in the exchange of the Fair Grounds for the Sommers farm, to be determined from the evidence under proper instructions from the court.

The complaint charges Pomeroy with being the plaintiff's agent, and his codefendants with knowledge. The defendants each deny such relation and challenge

2. the proof. The only direct evidence bearing upon such agency arises from the testimony of Pomeroy himself; and, at the expense of repetition, for convenience we reproduce it here. Being a real estate broker in the city of Auburn, appellee, Wimer, in the spring of 1902, requested Pomeroy to find a purchaser for the Fair Grounds for \$1,000, and directed its advertisement in the local papers at his (Wimer's) expense. Subsequently Wimer reduced the price to \$750, but in the summer following, no sale having been effected, it was mutually agreed to discontinue the advertisement. Nothing was said at the time whether the agency should close or continue, but on separating Wimer said to Pomeroy: "If you get hold of a piece of ground to sell, for which I can turn the Fair Grounds as part pay, let me know." He further testified: "My understanding [from the foregoing remark] was that if I found a piece of ground for sale that he could buy on terms that were satisfactory to him, and he could turn in the Fair Grounds as part pay, that he would pay me for turning in the Fair Grounds, and as to the other real estate, he was to determine for himself whether it was a satisfactory price." Having, in the autumn following, acquired, with Esselburn, the Sommers farm, in his first interview with Wimer, Pomeroy told him that he and others controlled the farm; that they were holding it for speculative purposes; that the price on it was \$3,500; that they would sell to the first one who would

pay their price; that he had never seen the land, and knew only what others told him about it; thought it would suit the plaintiff, and that he could put in the Fair Grounds at \$1,000. At the time of the interview Wimer had personally inspected the farm; had examined its soil in many places, and inspected the growing timber, and had taken the opinion of a timber expert as to its value. In the written agreement between Wimer and Pomeroy, "as agent of unnamed principal," is the language, "the first party (Pomeroy), as such agent, does hereby agree to sell to said second party said real estate * * * for the sum of \$3,500," as follows: \$2,400 cash, and conveyance of the Fair Grounds. Before the exchange of deeds Wimer was fully informed as to the persons interested in the Sommers farm, the sum paid therefor, and amount of their profits, but asserted that he was satisfied with his bargain. There was no written contract, no agreement as to fee or commission for securing sale or trade, no individual memorandum of agency, no power of sale, purchase, or exchange. All these facts and circumstances, and the natural inferences arising therefrom, were entitled to be considered in determining the true character and scope of Pomeroy's agency for appellee.

The actual relation here shown between the appellee and appellant Pomeroy is so limited and circumscribed as to amount to nothing more than a proposition on behalf of appellee that if Pomeroy would produce a purchaser for his Fair Grounds, or find another piece of real estate for which he could trade the Fair Grounds, he would impliedly be entitled to a reasonable fee or commission for his services. If this was in any sense an agency, it falls far short of being such a one as is governed by the rule the jury was directed, in the instruction, to apply. We agree that it is

- firmly settled that a confidential agent, with power
3. to sell or to buy can neither buy from himself nor sell to himself without the approval of the principal

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after full information of the facts relating to the transaction. *Rochester v. Levering* (1886), 104 Ind. 562, 567; *Fountain Coal Co. v. Phelps* (1884), 95 Ind. 271; *Mechem, Agency*, §455.

But the evidence does not show this to be a case of that kind. (Here the business was in no sense confidential.) The service of bringing a buyer or trader, if performed

4. by a stranger, would no doubt have been as acceptable to Wimer. (Pomeroy had no power to sell nor to trade the Fair Grounds; did not bind himself to find a buyer or a trader, and in fact did not sell or trade it.) He acted for Wimer in nothing, at any time, except in announcing his price on the Fair Grounds, and his readiness to trade it for other property, and in thus soliciting a customer. No one acted for appellee in trading for the Sommers farm. He was his own principal and agent. He went with Weeks to see the land, examined it for himself, tested its soil, procured an expert estimate of the value of the timber, and inquired of its value neither from Weeks nor Pomeroy. He determined that for himself, from the opinion he had from others. And before the deeds were delivered, and after being fully informed of the cost of the Sommers land and the amount of profits the purchasers were making by the trade, Wimer announced himself as satisfied with his bargain, and proceeded with the exchange of deeds. There is no pretense in this court that he paid more for the land than it was worth, or that he was in any way overreached. In the view most favorable to appellee, it must be said to be very clear, under the facts, that the true character of Pomeroy's relation to the transactions involved was a question for the jury, and the instruction therefore erroneous. There are other objections to the instruction that we leave unconsidered.

Judgment reversed, with instructions to grant appellants a new trial.

ON PETITION FOR REHEARING.

HADLEY, J.—The first point in appellee's petition for rehearing cannot be considered here, because it was

5. not made a point, nor even suggested in his original brief. Elliott, App. Proc., §557.

The second presents a complaint that we did not, in the former opinion, decide the question he made as to the sufficiency of the appellants' brief. The question al-

6. luded to is that appellants' motion for a new trial and the instructions given to the jury could not properly be considered in this appeal, for the reason that they were neither in substance nor in full set forth in appellants' original brief, as required by rule twenty-two of this court.

With respect to the motion for a new trial it may be said that it appears from the record that a joint and separate motion was overruled, and upon which ruling a joint and separate assignment is made in this court, the defenses not being identical. Appellants in their brief, under the heading of "Errors Relied upon for Reversal," state: "Separate assignments of error have been made by each appellant assigning one error only, viz., that the court erred in overruling his motion for a new trial. Some of the causes for a new trial are available to each of the appellants and some to one of them only. To avoid confusion we set forth separately the errors relied upon by each appellant. The appellant Esselburn relies upon the following errors for a reversal as to him: (1) The verdict of the jury against him is not sustained by sufficient evidence. (2) The court erred in giving to the jury instruction two," and so on, specifying, in five additional items, error in like terms as to instructions numbered three, eight, twelve, fifteen, and eighteen. Then follows separate, similar statements as to appellants Weeks and Pomeroy—each of the three selecting from his motion for a new trial, which con-

tained twenty reasons or assignments of error, and setting forth in brief only such of said reasons as he relies on for a reversal, thus leaving the reasons for a new trial not relied upon, unstated and unnoticed in his brief. In the body of points and authorities, and in connection with the points made against them, the instructions complained of are set forth in full.

The rules of this court do not define nor limit the particular matter to be set out under the respective subjects as enumerated in rule twenty-two. What the rules imperatively demand is that the matter called for by rule twenty-two, as a means of information to the judges not having the record, shall be supplied in the briefs. The precise order is not important, provided the parts be assigned in reasonably convenient and logical positions. The omission from the brief of those parts of the motion for a new trial that had been abandoned as constituting error was the proper thing to do. Such dead parts would occupy the time of the judges to no purpose, and are therefore better out of the brief than in it. While so much of the motion for a new trial as presents the error relied on, and

7. the full text of the instructions complained of, are set forth in appellants' brief under subject heads, perhaps not usually adopted, yet the positions selected are convenient, and the effort evinces an honest endeavor to comply with the rule. It will, therefore, be held sufficient.

The further complaint of appellee is that in the principal opinion we made a wrong application of the law to the facts proved in this case. The controlling question is one of agency. The character of the agency must

3. determine the legal rules that govern it. It is firmly settled that an agent with the discretionary power to sell or exchange must exercise that discretion for the sole benefit of his principal. In such cases there is an implied confidence, and reliance on the judgment and skill of the agent, which enters into the essence of the employ-

ment, and the latter will not be permitted to deal with himself, or accept like employment from the other party, without the fullest disclosures and consent of his employer or employers. *Rochester v. Levering* (1886), 104 Ind. 562, 568; *Cannell v. Smith* (1891), 142 Pa. St. 25, 21 Atl. 793, 12 L. R. A. 295; *Empire State Ins. Co. v. American Cent. Ins. Co.* (1893), 138 N. Y. 446, 34 N. E. 200.

But where an agent has no discretion or power to sell or exchange, and no authority beyond bringing the buyer and seller together to make their own bargain, cases

8. where the agent merely engages to find a purchaser or trader, on such terms as may be agreed upon by the parties when they meet, and where the terms of the employment involve no element of confidence or reliance upon the agent in determining the propriety of making a contract, or in fixing the terms thereof, the great weight of authority holds that such an agent may act for both parties in bringing them together, and be entitled to compensation from both, whether or not the parties severally knew that he was acting for both. *Alexander v. Northwestern Christian University* (1877), 57 Ind. 466, 479; *Cox v. Haun* (1891), 127 Ind. 325; *Rupp v. Sampson* (1860), 82 Mass. 398, 401, 77 Am. Dec. 416; *Jarvis v. Schaefer* (1887), 105 N. Y. 289, 11 N. E. 634; *Herman v. Martineau* (1853), 1 Wis. *151, 60 Am. Dec. 368; Tiffany, Agency, p. 419; 1 Clark & Skyles, Agency, §414; 2 Clark & Skyles, Agency, §781; *Knauss v. Krueger Brewing Co.* (1894), 142 N. Y. 70, 36 N. E. 867. In the last case cited the learned judge illustrated the question under consideration thus: "If A is employed by B to find him a purchaser for his house upon terms and conditions to be determined by B when he meets the purchaser, I can see nothing improper or inconsistent with any duty he owes B for A to accept an employment from C to find one who will sell his house to C upon terms which they may agree upon when they meet. And there is no violation of duty

in such case in agreeing for commissions from each party upon a bargain being struck, or in failing to notify each party of his employment by the other.”

— If an agent, under the limitations and terms above stated, may act for both parties, and recover compensation from both, there can be no sound reason why one

9. who engages, under similar restrictions, to find a purchaser or trader for another may not himself become the purchaser or trader, as well as a stranger, provided that in doing so he violates no obligation, and fully discloses to his employer his personal relations to the subject-matter. The fact that he has undertaken to find a purchaser for the property does not impress upon the agent any particular incapacity to buy or trade for the property himself, nor make a trade with him less profitable to his employer. And if the principal, with full knowledge of all the material facts concerning the transaction, enters into negotiations with him and consummates a trade the transaction is valid, and the agent entitled to his compensation. *Rochester v. Levering, supra*; *Stewart v. Mather* (1873), 32 Wis. 344, 355; 1 White & Tudor's Leading Cases in Equity, Part 1, p. 219; *Burke v. Bours* (1893), 98 Cal. 171, 32 Pac. 980; 1 Clark & Skyles, Agency, §413; 1 Am. and Eng. Ency. Law (2d ed.), 1081. In the case of *Stewart v. Mather, supra*, it is said: “Where the broker merely engages to find a purchaser at such price as may be agreed upon, if he presents himself as such purchaser, and the seller, with full knowledge of that fact, so receives and enters into negotiations with him, and a sale is consummated, the broker may recover his commissions.”

What then is the nature of the commission, the appointment in this case? Its scope is found within the limits of these three words, “Let me know.” As shown by

2. the facts stated in the principal opinion, Wimer and Pomeroy, having decided to give up the effort to sell the Fair Grounds for cash, as they separated, Wimer

said to Pomeroy: "If you get hold of a piece of ground to sell, for which I can turn the Fair Grounds as part pay, let me know." Other evidence in the case tended to qualify the remark as follows: "If you get hold of a piece of ground to sell, that is suitable for raising potatoes and onions, and for which I can put in the Fair Grounds as part pay, let me know, and I will do what is right with you." Note the character of the commission: "If you get hold of a piece of land"—as agent or owner, which? Or how did, or how could the source of title make any difference to Wimer, if he got what was satisfactory to him. And the instruction was, not to go ahead and make a trade or take an option, but "let me know." In other words, all that Wimer desired or authorized Pomeroy to do in the matter was to let him know if he (Pomeroy) got hold of such a farm as Wimer could trade for on the terms proposed. Pomeroy made no response to Wimer's request. He did not say whether he would, or would not, let him know if he got hold of a desirable farm. Certain it is from the evidence that Pomeroy did not promise, or place himself under any obligations to do so.

Now what was done under this appointment, if it may be called such? The parties met in Pomeroy's office. Wimer, in company with appellant Weeks, had seen the land; had fully examined the quality of the soil and had a report from an expert as to the value of the timber. Pomeroy, at the time of their first meeting, had never seen the land, and informed Wimer that he and others were holding it for speculative purposes, but would trade it to him for his Fair Grounds and \$2,400 cash. A bargain was struck and a written contract executed on this basis. Two weeks later when the parties again met at Pomeroy's office, by appointment, to exchange the deeds, and before the exchange, Pomeroy fully informed Wimer that he and his coäppellants were the owners of the land, what they paid for it, and the amount of their profits on the contract basis.

After this information Wimer expressed himself as satisfied with the trade, prepared a deed conveying the Fair Grounds to these appellants, and proceeded with the exchange of conveyances in accordance with the previous contract.

Appellee makes no pretense that he was deceived or in any way overreached in the trade, or that the farm he got was worth less than he paid for it, and, as we understand it, relies wholly upon the technical disability of his agent to buy a farm and trade it to him at a profit. The transaction, as we have seen, was characterized with no discretion in the agent, no special confidence, no reliance upon the agent's judgment or skill, no authority to bind nor obligation to advise, made at arms length, on fair terms, with full knowledge of his adversary, and all material facts, and presents such a case as clearly made it error for the court to charge the jury, among other objectionable things, that it is "undisputed that when said defendant Pomeroy entered into said contract with said Wimer for the sale of said land he was holding said twenty-one acres as agent for the plaintiff for sale."

Petition for rehearing overruled.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY v. HAYES.

[No. 20,876. Filed December 12, 1906.]

1. RAILROADS.—*Setting Fires.—Spark-Arresters.*—Railroad companies must not only use the best and most approved spark-arresters, but they must keep them in good condition while in use. p. 457.
2. TRIAL.—*Interrogatories to Jury.—Answers of Want of Knowledge.—Legal Effect.*—Interrogatories to the jury answered "we cannot state" and "we do not know" are of no legal effect, except that they are not a finding that there was no evidence on the questions involved therein. p. 457.

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3. **TRIAL.**—*Interrogatories to Jury.*—*Failure to Answer.*—*Rights of Parties.*—Where a jury failed to answer interrogatories directly, it is the duty of the court, on motion, to require them to answer definitely. p. 457.
4. **SAME.**—*Interrogatories to Jury.*—*Answer of "No Evidence."*—*Effect.*—An answer of "no evidence" to an interrogatory to the jury, is a finding that the facts involved in such interrogatory are not proved; and the court's duty is to consider such failure in determining whether the general verdict can stand in the absence of such proof. p. 457.
5. **SAME.**—*Interrogatories to Jury.*—*Railroads.*—*Setting Fires.*—*Spark-Arresters.*—*Care.*—Where the interrogatories to the jury, in an action against a railroad company for negligently setting fires by reason of using a faulty spark-arrester, and in overtaxing its engine, failed to show a thorough inspection of the spark-arrester before starting and also failed to negative negligence in the management of the locomotive, and there was no finding as to the condition of the spark-arrester at the time of the setting of the fire, the general verdict for plaintiff must prevail. p. 458.
6. **SAME.**—*Verdict.*—*General.*—*Special.*—*Which Prevails.*—The general verdict prevails unless the answers to the interrogatories to the jury are in such conflict therewith that no supposable evidence under the issues will remove same. p. 458.
7. **APPEAL AND ERROR.**—*Briefs.*—*References to Transcript.*—Where complaint is made of the introduction of alleged incompetent evidence, but the brief does not indicate the place in the transcript where it is found, the Supreme Court may refuse to consider such alleged error. p. 458.
8. **EVIDENCE.**—*Flying of Burning Sparks.*—*Distance.*—Evidence of the distance which flying sparks were carried from a burning barn is admissible as a part of the *res gestae* in an action against a railroad company for negligently setting fire to such barn, thereby setting on fire a house and storeroom, though the direction of the wind was not shown to have been the same as when the sparks left the engine. p. 458.
9. **RAILROADS.**—*Spark-Arresters.*—*Inspection.*—*Care Required.*—Railroad companies cannot be held guiltless of negligence as to their care in using an unsafe spark-arrester merely from the fact that they had employed a competent inspector; but they must show that the inspection was a reasonably careful one. p. 459.
10. **APPEAL AND ERROR.**—*New Trial.*—*Instructions.*—*Joint Assignment.*—Where three instructions are jointly assigned as a reason for a new trial, error cannot on appeal be predicated upon one of them only. p. 460.

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11. APPEAL AND ERROR.—*New Trial.—Evidence.—Sufficiency.—How Considered.*—In passing upon the sufficiency of the evidence on appeal only the theory most favorable to the successful party will be considered. p. 460.
12. NEW TRIAL.—*Evidence.—Railroads.—Setting Fires.*—Where the evidence, in an action against a railroad company for negligently setting fires, showed that an engine was drawing thirty-two cars, mostly loaded, up a grade of from forty to fifty feet per mile, and sparks of the size of a dime were thrown 100 feet and that a barn was set on fire, thereby setting on fire plaintiff's house and storeroom, negligence is sufficiently shown. p. 460.
13. EVIDENCE.—*Weighing of.—Circumstantial.—Railroads.—Setting Fires.*—A railroad company may be held negligent in setting fires, though its inspector, experts and servants all testify that its spark-arrester was of the most approved pattern, properly inspected and in good condition, where other evidence shows that the locomotive emitted sparks the size of a dime, throwing them a distance of 100 feet, thus causing damage to plaintiff, the weight of such circumstantial evidence being for the jury. p. 461.

From Ohio Circuit Court; *George E. Downey*, Judge.

Action by Harry R. Hayes against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment on a verdict for \$2,925 for plaintiff, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

L. J. Hackney, George M. Roberts and T. S. Cravens, for appellant.

Givan & Givan and Charles B. Matson, for appellee.

GILLETT, J.—This is an action brought by appellee against appellant to recover damages because of the destruction of his property by fire set by one of appellant's locomotives. The complaint was in two paragraphs. The first was based on negligence in the failure to use and keep in repair a sufficient and proper spark-arrester, while the second charged negligence in overtaking the locomotive. Each paragraph averred that the negligence therein alleged caused the locomotive to throw out large sparks and coals

of fire, which fell upon plaintiff's barn and consumed it, and that the fire communicated to and destroyed the plaintiff's dwelling-house and store building. Appellant was defeated below, and the errors assigned are based on the overruling of its motion for judgment in its favor on the jury's answers to interrogatories and on the overruling of its motion for a new trial.

Appellant was not entitled to judgment in its favor on the jury's answers to interrogatories. If it be granted that appellant had a finding in its favor to the effect that

1. the locomotive was equipped with a spark-arrester which was one of the best and most approved appliances for arresting sparks, yet there is no finding as to the condition of said appliance, either at the time the locomotive was taken from the roundhouse for the purpose of making the trip in question or at the time it passed appellee's property. Interrogatories forty-five, forty-six, forty-seven and forty-eight, which were answered "We

2. cannot state," or "We do not know," really amount to nothing. Such answers are not equivalent to a finding of no evidence. *Allen v. Davison* (1861), 16 Ind. 416; *Maxwell v. Boyne* (1871), 36 Ind. 120; *Rowell v. Klein* (1873), 44 Ind. 290. If appellant was en-

3. titled to answers to these interrogatories, it was the duty of the court, on motion, to require the jury to retire and answer them in accordance with the preponderance of the evidence, or if they found that there was no evidence upon the point, so to answer. *Perry, etc., Stone Co. v. Wilson* (1903), 160 Ind. 435; *Chicago, etc., R. Co. v. Ostrander* (1888), 116 Ind. 259; *Pittsburgh, etc., R. Co. v. Hixon* (1887), 110 Ind. 225. In the event of an answer of "No evidence," its effect would be to

4. establish the fact that the matter to which the interrogatory related was unproved, and it would then be for the court to determine whether said finding, together with the other findings, established the fact that appellant

was entitled to judgment notwithstanding the general verdict. The answers in question, however, instead of amounting to matter negating the averments of

5. the complaint, tend rather to show, if they can be said to have any effect at all, that the jury did not credit the evidence of prior inspection which appellant had offered in support of its defense. There was a finding, however, that the inspection was not thorough, and we observe that the charge of negligence in respect to the management of the locomotive was in nowise negated by the interrogatories. These considerations, and the fact that appellant did not see fit to take a special finding from the jury on the question as to the condition of the spark-arrester at the time in question, make it clear that appellant was not entitled to judgment on the answers to interrogatories. We are not at liberty to reverse the trial court because of the overruling of said motion, by indulging

6. in matter of conjecture as to the theory on which the jury must have proceeded. It is to be remembered that the motion called for affirmative action, and unless the answers necessarily negated the general verdict, by showing that under the facts found appellee was not entitled to judgment under the issues, it was the duty of the court to overrule the motion. *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662, and cases cited.

Passing to the second assignment of error, we find that the first insistence thereunder is that the court erred in permitting a witness, one Smith, to answer as to

7. how far the sparks were carried from the burning barn. Appellant has left it to us to search out this evidence in the record, and because of a failure to indicate by page and line where it is to be found, we would be justified in passing the point by. Rule twenty-two. We are of the opinion, however, that there was no error in

8. receiving such evidence. While it might not amount to demonstrative evidence of the fact that sparks

were thrown by the locomotive to the roof of the barn, since the condition of the wind might not have been the same in each instance, yet appellee was called on to show, in order to recover for the destruction of the house and storeroom, that the destruction of said buildings was caused by the burning of the barn. The evidence showed that the wind was from the north, and the house, which was the second building to catch on fire, stood about twenty-five or thirty feet to the southwest of the barn. It seems to us, under the circumstances, that to show the extent of the fire, including a showing as to the distance that sparks were thrown, was a part of the *res gestae* of the occurrence, since it tended to show how fierce the fire became as it was fanned by the wind, thus making legitimate the inference that fire communicated to the dwelling-house from the burning barn.

The court did not err in refusing to give instructions thirteen and fourteen tendered by appellant. Without setting out even the substance of these instructions, it

9. may be said that they seem to proceed upon the theory, in the one instance, that the company might acquit itself of negligence by the employment of a competent inspector, and, in the other, that that fact, coupled with the fact that the spark-arrester appeared to him to be in good condition, was sufficient to absolve the company from any claim that its dereliction grew out of the failure to inspect. These instructions were not proper because they did not include the element of a reasonably careful inspection. *Cleveland, etc., R. Co. v. Ward* (1897), 147 Ind. 256. While the matter of a failure to inspect is only an element in the question of negligence, yet, so far as it is an element, it must be said that any dereliction upon the part of a servant, no matter how competent he may be, is the omission of the master. A man cannot acquit himself of negligence by evidence that he intrusted to a competent servant the discharge of a duty which he owed to third persons. To reach such a conclusion would be to disregard

a basic principle in the law of negligence, which finds expression in the rule of *respondet superior*. 1 Shearman & Redfield, Negligence (5th ed.), §142.

No question is saved concerning the refusal to give instruction seven, tendered by appellant, as the refusal to give that instruction and also instructions twelve

10. and thirteen are jointly assigned as error in the motion for a new trial.

Finally, appellant challenges the sufficiency of the evidence to support the verdict. We cannot say that there is an absence of evidence in support of any issue.

11. On the trial, so far as the question of appellant's negligence was concerned, there was abundant evidence to justify the conclusion that the spark-arrester was defective or that the locomotive was being overtaxed. Accepting, as we must, the testimony most favorable to appellee, it appears that the locomotive in question, which was attached to a train of thirty-two cars, mostly loaded, was at the time running from twenty to twenty-five

12. miles an hour, up a grade of between forty and fifty feet to the mile, and that the train was on a curve. The testimony of those who heard and saw the locomotive justified the conclusion that it was being overtaxed. As to the spark-arrester, it may be said that witnesses for appellee likened the size of the sparks escaping from the stack to dimes, nickels, large marbles, or the end of the thumb, and one witness claimed that some of them were an inch across. A former employe of appellant, who was on a nearby water-tank, on the south side of the track, testified that he climbed down as the train was approaching, for the reason that he observed that the locomotive was throwing heavy sparks. A large quantity of these sparks was observed to fall upon appellee's barn, and some of them fell more than a hundred feet from the track. One of appellee's expert witnesses admitted upon the stand that if the locomotive had been in good condition it would not throw

sparks the size of a dime. Disregarding the claim of appellee's counsel as to discrepancies in the testimony of the man who examined the spark-arrester, it must nevertheless be said that if the jury saw fit to credit the testimony most favorable to appellee a case was made out, in which it was shown, by circumstantial evidence, either that the spark-arrester was defective, or that the locomotive was being overtaxed. *Cincinnati, etc., R. Co. v. Smock* (1893), 133 Ind. 411. The mere fact that the testimony given by the

locomotive inspector and the trainmen was not
13. directly contradicted, does not make out a case in which it can be said that their testimony was wholly undisputed. A leading writer on the law of negligence says: "The negligence of the railroad company in communicating the fire may be proved wholly by circumstantial evidence, and there need not necessarily be direct proof of any particular act or omission upon which the law predicates negligence. Circumstantial evidence raising an inference of negligence is as good, for the purpose of taking the question to the jury, as is direct evidence; and when it is so taken to them, the judge cannot properly withdraw it from them, merely because he may suppose—usurping their functions—that the evidence of negligence has been rebutted by evidence adduced for the defendant. It is for the jury to judge of the weight and sufficiency of the countervailing evidence." 2 Thompson, Negligence (2d ed.), §2291.

We have now considered the various questions which the case presents, and as we find no error the judgment is affirmed.

GOOD ET AL. v. BURK.

[No. 20,675. Filed May 29, 1906. Rehearing denied December 12, 1906.]

1. **APPEAL AND ERROR.**—*Assignments of Errors.*—*Names of Parties.*—An assignment of errors setting out the full names of all the parties appellant and alleging that they were the same parties who were petitioners below, is good, though some of their Christian names below were signed only by initial, and in some instances only the partnership names were used. p. 464.
2. **PLEADING.**—*Complaint.*—*Names of Parties.*—*Judgment.*—Orders made by a board of commissioners in accordance with the prayer of a petition are not void because some of the petitioners signed same by their surnames and initials only of the Christian names, and others by their partnership names alone. p. 465.
3. **INTOXICATING LIQUORS.**—*Remonstrance.*—*Signatures.*—*Sufficiency.*—A remonstrance, under §7283i Burns 1901, Acts 1895, p. 248, §9, against the granting of a license to sell intoxicating liquors, is sufficient though signed by the surnames and initials of the Christian names only of the remonstrators. p. 465.
4. **PLEADING.**—*Complaint.*—*Names of Parties.*—The defendant has the right to request that plaintiffs' full names shall be set out in the pleadings in the cause. p. 466.
5. **APPEAL AND ERROR.**—*Interurban Railroads.*—*Names of Parties.*—*Failure to Object.*—*Waiver.*—A failure of a remonstrant, in an interurban railroad subsidy proceeding, to object in the trial court to names of the petitioners, which were signed in some cases by the surnames and initials only of the Christian names, and in other cases by partnership names only, is a waiver of the right to question same on appeal. p. 466.
6. **PARTIES.**—*Interurban Railroads.*—*Subsidies.*—*Petitions.*—*Signatures.*—Petitioners for an interurban railroad subsidy election, though signing by surnames and initials only of Christian names, and by partnership names, are parties and have the right to take any steps deemed necessary in the conduct of the proceeding. p. 466.
7. **APPEAL AND ERROR.**—*Boards of Commissioners.*—*Interurban Railroads.*—*Elections.*—*Expiration of Time Fixed for.*—*Effect.*—An appeal to the Supreme Court from an order fixing a day for an interurban railroad subsidy election, will not be dismissed because the case on appeal could not be heard until after

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- the expiration of the day fixed for such election, the duty of the board of commissioners on a remanding of the cause being to fix another day for such election. p. 466.
8. **APPEAL AND ERROR.**—*Motion to Dismiss.*—*Whether in Record without Bill of Exceptions.*—*Statute.*—A motion to dismiss an appeal from the board of commissioners, the ruling thereon and exception thereto are in the record by virtue of §641c Burns 1905, Acts 1903, p. 338, §3, without a bill of exceptions. p. 467.
 9. **SAME.**—*Final Judgment.*—*Boards of Commissioners.*—Appeals, under §7859 Burns 1901, §5772 R. S. 1881, can only be taken from the final judgments rendered by the boards of commissioners. p. 467.
 10. **SAME.**—*Final Judgments.*—*What Are.*—*Interurban Railroads.*—*Subsidies.*—*Elections.*—Final judgment by the board of commissioners, in case of action favorable to petitioners for an interurban railroad subsidy, is rendered only after an election, and consists in the granting of the prayer of the petition and the levying of the tax to pay such subsidy. p. 468.
 11. **SAME.**—*Interlocutory Judgments.*—*Dismissal.*—*Constitutional Law.*—The Supreme Court will not decide a question of constitutional law involved in an appeal taken from an interlocutory judgment of the board of commissioners, there being no right of appeal in such a case. p. 468.

From Clinton Circuit Court; *Samuel R. Artman*, Special Judge.

Petition by George M. Good and others, against which Samuel W. Burk defends. From a judgment for defendant, petitioners appeal. *Reversed.*

D. S. Holman, John C. Farber and *James V. Kent*, for appellants.

Asa H. Boulden and *Martin A. Morrison*, for appellee.

MONKS, J.—This proceeding was brought before the Board of Commissioners of the County of Clinton by appellants, more than twenty-five freeholders of Center township, in said county, asking said township to make an appropriation of money to aid the Tipton, Frankfort & Attica Traction Company, an interurban railroad company, organized under the laws of this State, in constructing its railroad in and through said township, subject

to certain conditions in regard to the construction and equipment of its principal power-house and machine shops. The proceeding was brought under the act of 1869 (Acts 1869 [s. s.], p. 92), and acts amendatory thereof and supplemental thereto (§5341 *et seq.* Burns 1901, §4046 *et seq.* R. S. 1881, and Acts 1903, p. 223, §5340a Burns 1905). Appellee was, on his application, made a defendant by order of the board of commissioners. Such proceedings were had that said board of commissioners found for the petitioners, and ordered that the question of making said appropriation of money by said township be submitted to the voters of said township, and fixed a day for said election to be held as provided in §§5341-5350 Burns 1901, §§4046-4055 R. S. 1881. From this order appellee appealed to the court below, where appellants filed a written motion to dismiss said appeal, for the reason that the order of the board from which the appeal was taken was an interlocutory order and not a final judgment that ended the proceeding before the board. The court below overruled said motion, and on its own motion dismissed said proceeding, and rendered final judgment against appellants.

The errors assigned call in question the action of the court (1) in overruling appellants' motion to dismiss said appeal; (2) in dismissing the proceeding on its own motion. Appellee claims that this court has no juris-

1. diction of the appeal because all the parties to the judgment of the court below are not shown by the record to be parties to this appeal, citing Ewbank's Manual, §§144, 146. Appellee in his brief says that this contention rests on the fact "that in the court of the board of commissioners and in the circuit court many of the petitioners, now appellants, appeared only by initials, or by copartnership names, or by nicknames, and there is nothing in the entire record, up to and including the final judgment of the circuit court, to amend or correct this de-

fect.” It is true that many of the petitioners in signing the petition signed their Christian names by the initial letters only, and that in a few cases firm names were signed. In this court, however, the full names of all the appellants are given in the assignment of errors, and it is alleged in the assignment of errors that said appellants “are the same and identical persons who signed the petition filed in the commissioners court in this cause.” The objection to the assignment of errors is not tenable. The proceed-

2. ings before the board of commissioners and in the court below are not void on account of the manner in which many of the appellants signed the petition. *Myers v. Wilson* (1906), 166 Ind. 651, and cases cited. Appellee contends that the appellants who signed their Christian names to the petition by the initial letters only, had no standing in the court below and could make no motion and take no exceptions to any ruling of the court thereon, and that as the motion to dismiss the appeal in the court below was the joint motion of all the petitioners, the exception taken by said petitioners to the ruling of the court thereon was ineffectual as to those who had no standing in court, and was therefore ineffectual as to all. The statute under which this proceeding was brought only requires that the petition be “signed” by twenty-five freeholders of the township of such county, etc. §5340 Burns 1901, Acts 1889, p. 82. Nothing is said as to the manner of signing said petition.

It was held by this court in *Collins v. Marvil* (1896), 145 Ind. 531, that the signature of a remonstrant under section nine of the act known as the Nicholson law

3. (§7283i Burns 1901, Acts 1895, p. 248) was sufficient if he signed his “surname in full and his Christian name by the initial letter.” See, also, *Ferguson v. Smith* (1872), 10 Kan. 396; 14 Ency. Pl. and Pr., 274; 21 Am. and Eng. Ency. Law (2d ed.), 308, 309.

While the petition was not rendered void or ineffective because not signed by the full Christian name as well as the surname of each petitioner, it may be true that,

4. by raising the question in a proper manner and form at the proper time appellee would have been entitled to have the full Christian name and surname of each petitioner entered of record as a party plaintiff. *Hopper v. Lucas* (1882), 86 Ind. 43, 49. It does not appear that any objection was raised before the board of

5. commissioners or in the circuit court as to the manner in which the petition was signed, or that any question was raised or presented in regard to the same. It is too late to present the question now, for the reason that unless such questions are properly presented to the court below they cannot be considered on appeal. *Ewbank's Manual*, §§7, 24, 38; *Elliott, App. Proc.*, §470. The petitioners, the appellants here, were parties to said proceeding before the board and in the circuit court

6. regardless of how they signed their names to the petition, and were bound by the judgments of said tribunals until vacated or set aside, and had the right to take steps in said cause, make objections, take exceptions, and assign errors on appeal, the same as if each had signed his Christian name and surname in full.

It is next insisted by appellee that as the time fixed by the board of commissioners for holding said election had passed before the appeal to this court was perfected,

7. the question involved in this case became a moot question, and this appeal must be dismissed. This contention of appellee cannot be sustained, for the reason that if this cause is reversed, and the court below is directed to dismiss the appeal, it will be the duty of the board of commissioners to fix another day for said election.

Under section three of the act of 1903 (*Acts 1903*, p. 338, §641c *Burns 1905*) the motion of appellants in the

court below to dismiss the appeal from the board
8. of commissioners and the ruling of the court thereon and the exception of the appellants to said ruling were parts of the record without a bill of exceptions. Since the taking effect of said act all the papers and entries necessary to a review of said ruling in this court on appeal are a part of the record without filing a bill of exceptions.

It is claimed by appellee that the court below properly overruled said motion to dismiss the appeal, and of its own motion dismissed the proceedings because (1) the

9. word "railroad," used in the act of 1869 and subsequent acts providing for the voting of aid to railroad companies, does not include interurban street railroads, and that under said acts the board of commissioners has no jurisdiction to act on any petition to vote aid to such interurban street railroads; (2) the act of 1903 (Acts 1903, p. 233, §5340a Burns 1905), which provides that said acts "be extended to and held to include every kind of street railroad, suburban street railroad, or interurban street railroad," is unconstitutional and void. It has been held by this court under said act of 1869 and acts amendatory thereof and supplemental thereto, that when the board of commissioners entered an order granting the prayer of the petitioners, or refusing to grant the prayer thereof, an appeal may be taken therefrom under §7859 Burns 1901, §5772 R. S. 1881 and Horner 1901. *Board, etc., v. Conner* (1900), 155 Ind. 484, 490, and cases cited. While said section provides that an appeal may be taken from any decision of the board, it has been uniformly held that the same must be final in its nature, and that it must put an end to the proceedings before that tribunal. *Summe v. Browne* (1905), 165 Ind. 490, and cases cited; *Strebin v. Lavengood* (1904), 163 Ind. 478, 484, 485.

It is provided in §5351 Burns 1901, §4056 R. S. 1881 and Horner 1901, that "if a majority of the votes cast

shall be in favor of such railroad appropriation, the
10. board of county commissioners, at its ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax," etc. It is evident that when the board of commissioners orders an election, and fixes the date thereof as provided in §5341 Burns 1901, §4046 R. S. 1881 and Horner 1901, the proceeding is not at an end before the board, for the result of said election determines whether the board shall grant or refuse to grant the petition. In this case the appeal was taken from the order of the board ordering the election and fixing the date when it should be held. This was a mere interlocutory order, from which, under the authorities, no appeal could be taken.

Even if appellee's contentions that the railroad aid acts do not include interurban street railroads, and that the act of 1903 (Acts 1903, p. 233, §5340a

11. Burns 1905) is unconstitutional, are correct, questions we need not and do not decide, no appeal could be taken in said proceeding until the order granting or refusing to grant the petition was made by the board under §5351, *supra*. It follows that the court erred in overruling appellants' motion to dismiss said appeal and in dismissing the proceedings.

Judgment reversed, with instructions to sustain the petitioners' motion to dismiss the appeal and return the papers in the cause to the board of commissioners for further proceedings.

CITY OF RICHMOND v. LINCOLN, ADMINISTRATRIX.

[No. 20,864. Filed December 13, 1906.]

1. MUNICIPAL CORPORATIONS. — *Negligence.* — *Electric Lights.* — *Operation.* — Cities are liable for negligence in the operation of electric light plants used to furnish light for such cities and for commercial purposes. *Aiken v. City of Columbus*, ante, p. 139, followed. p. 470.

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2. MUNICIPAL CORPORATIONS. — *Negligence.* — *Electric Lights.* — Cities are liable for negligence in the operation of their electric light plants, although such plants are controlled by boards of electric light commissioners appointed by such cities' councils by virtue of §§3543a-3543g Burns 1901, Acts 1901, p. 423, such boards being amenable to, and removable at the will of, such councils (§3536 Burns 1901, §3101 R. S. 1881). p. 470.
3. APPEAL AND ERROR. — *Briefs.* — *Evidence.* — Failure of appellant to set out in its brief on appeal the evidence or a condensed recital thereof waives any question thereon. p. 471.

From Henry Circuit Court; *John M. Morris*, Judge.

Action by Emma Lincoln, as administratrix of the estate of William M. Lincoln, deceased, against the City of Richmond. From a judgment on a verdict for plaintiff for \$5,000, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

Mark E. Forkner and *Robbins & Starr*, for appellant.

Thomas J. Study, *Wilfred Jessup*, *W. O. Barnard* and *W. E. Jeffrey*, for appellee.

MONKS, J.—This action was brought by appellee to recover damages for the death of William M. Lincoln, alleged to have been caused in the year 1903 by the negligence of appellant "in the management and operation of its electric light plant, erected, maintained and operated to furnish electricity with which to light the streets of said city and to supply the inhabitants thereof with electricity for domestic and commercial purposes for pay." A demurrer to the complaint for want of facts was overruled. A trial of said cause resulted in a verdict, and, over a motion for a new trial, a judgment in favor of appellee.

The errors assigned call in question the action of the court in overruling (1) the demurrer to the complaint, and (2) the motion for a new trial.

Counsel for appellant contend that appellant, "in operating its municipal lighting plant for municipal and com-

mercial purposes, acted under the police power in

1. the discharge of a governmental duty, and is not liable in damages for the negligent discharge of this duty." Since the filing of appellant's brief in which this contention is made, this court has held to the contrary in *Aiken v. City of Columbus* (1906), *ante*, 139. See, also, *Esberg Cigar Co. v. City of Portland* (1899), 34 Ore. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. 651, and cases cited; note to *Carson v. City of Genesee* (1903), 108 Am. St. 127, 140-145, 166-169, 174; *Rhobidas v. Concord* (1899), 70 N. H. 90, 47 Atl. 82, 85 Am. St. 604, and cases cited, and note pp. 617, 618, 51 L. R. A. 381; *Dickinson v. City of Boston* (1905), 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664; *Tindley v. City of Salem* (1884), 137 Mass. 171, 50 Am. St. 289; *Hand v. Inhabitants of Brookline* (1879), 126 Mass. 324; *City of Chicago v. Selz, Schwab & Co.* (1903), 202 Ill. 545, 67 N. E. 386, and cases cited; 1 Smith, Mun. Corp., §§775-783; 20 Am. and Eng. Ency. Law (2d ed.), 1193-1198; 3 Abbott, Mun. Corp., pp. 2254, 2255; 2 Cooley, Torts (3d ed.), 1011-1014.

It is next insisted by appellant that as it had placed its electric light plant in the hands and under the control of electric light commissioners, under the act of 1901

2. (Acts 1901, p. 423, §§3543a-3543g Burns 1901), it was not liable for the negligence of such commissioners or their employes. The members of the board of electric light commissioners under said act were appointed and their compensation fixed by the common council of appellant, and they were amenable to, and subject to removal by, said common council for a failure to perform their duty to the city in managing and operating said plant. §3536 Burns 1901, §3101 R. S. 1881 and Horner 1901; *Muhler v. Hedekin* (1889), 119 Ind. 481. Said board of electric light commissioners was appointed by the common council under said act for the benefit of appellant, and, in

the management and operation of its electric light plant, said board acted for and on behalf of, and represented, said city, and was not an independent body acting for itself. Not being an independent body, but acting for and representing the city, the city is liable for the negligence of said board, within the rule as to municipal liability for an officer's negligence. 1 Smith, Mun. Corp., §§775-783; *Pettengill v. City of Yonkers* (1889), 116 N. Y. 558, 564, 565, 22 N. E. 1095, 15 Am. St. 442; *Ehrgott v. Mayor, etc.* (1884), 96 N. Y. 264, 48 Am. Rep. 622; *Bailey v. Mayor, etc.* (1842), 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Mayor, etc., v. Bailey* (1845), 2 Denio (N. Y.) 433; *Rhobidas v. Concord, supra*; note to *Carson v. City of Genesee* (1903), 108 Am. St. 127, 164-168. See, also, *Esberg Cigar Co. v. City of Portland, supra*.

It is next insisted by appellant that no recovery can be had in this action on account of the contributory negligence of the deceased. Appellee contends that "appel-

3. lant, by failing to set out in its brief a condensed recital of the evidence in narrative form on this issue and the causes for a new trial, has waived the determination" of said question. This contention of appellee must be sustained. We have, however, examined and considered the evidence bearing on said question, and are of the opinion that the same was properly submitted to the jury for their determination.

Judgment affirmed.

ELLISON ET AL. v. GANIARD, TRUSTEE.

[No. 20,835. Filed December 14, 1906.]

1. APPEAL AND ERROR.—*Briefs.—Compliance with Rules.*—Substantial compliance with the Supreme Court rules in the preparation of briefs is all that is required. p. 481.
2. SAME.—*New Trial.*—*"Findings."*—*Words and Phrases.*—The use of the word "findings" instead of "decision" in the

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motion for a new trial is a sufficient compliance with subd. 6, §568 Burns 1901, §559 R. S. 1881, providing reasons for which new trials may be granted. p. 481.

3. TRUSTS.—*Writings.—Deeds.*—A deed of land by a mother to a son accompanied by a written appointment of him as trustee to sell the lands conveyed and to distribute the proceeds equally to her children, which appointment was accepted by such son in writing, constitutes an express trust under §3391 Burns 1901, §2969 R. S. 1881. p. 485.
4. SAME.—*Powers.—Deeds.—Title Conveyed.*—A deed to a trustee, directing him to convey the property and distribute the proceeds to determinable beneficiaries, is sufficient to authorize him to transmit a fee-simple title to his grantee. p. 487.
5. SAME.—*Deeds.—Contracts.—Recording.*—The execution of a deed conveying certain lands, together with a separate writing appointing the grantee as a trustee to sell the same and distribute the proceeds to determinable beneficiaries, constitutes, as between the parties, an express trust; and the failure to record such separate writing did not impair the trust. p. 487.
6. SAME.—*Trustees.—Bankruptcy of.—Effect on Trust Property.—Execution.*—Property held in trust by a bankrupt, not being liable to execution for such bankrupt's debts, does not pass to such bankrupt's trustee under the bankruptcy law of 1898 (30 Stat., pp. 544, 565, §70, U. S. Comp. Stat., p. 3451). p. 488.
7. BANKRUPTCY.—*Trustees.—Title to Property.—Equities.*—Trustees in bankruptcy take their bankrupts' titles, which are unaffected by fraud, burdened with all the equities to which such titles were subject in the hands of such bankrupts. p. 488.
8. DEEDS.—*Contemporaneous Contracts.—Construction.—Trusts.—Bankruptcy.—Quieting Title.*—A deed absolute upon its face, when construed with a contemporaneous writing executed with such deed, which creates the grantee a trustee of the granted property and directs a sale thereof and a distribution of the proceeds to certain determinable beneficiaries, passes no beneficial title to such grantee; and his trustee in bankruptcy cannot maintain a suit thereon to quiet title. p. 489.
9. BANKRUPTCY.—*Title.—Unrecorded Trust.—Trustee's Right to Quiet Title.—Estoppel in Pais.*—A trustee in bankruptcy has no right to a decree quieting his title to lands held in trust by the bankrupt by an unrecorded instrument, the deed to such bankrupt on record appearing absolute, because of an estoppel in pais, where but two out of 800 of the creditors relied upon the bankrupt's ownership of such property when they became creditors. p. 489.

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10. **ESTOPPEL.**—*Nature of.*—*Bankruptcy.*—*Trustee.*—Where a creditor dealt with a bankrupt, relying upon the bankrupt's ownership of property held by him under a deed absolute upon its face, such property in reality being held in trust, such creditor, to avail himself of an estoppel, must bring a suit to subject such land to the payment of his claim, the trustee in bankruptcy being unable to assert such an estoppel. p. 490.

From Lagrange Circuit Court; *R. S. Robertson*, Special Judge.

Suit by Sidney K. Ganiard, as trustee of Rollin Ellison, a bankrupt, against Alice H. Ellison and others. From a decree for plaintiff, defendants appeal. Transferred from the Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

O. L. Ballou and *T. E. Ellison*, for appellants.

John W. Hanan and *Barrett & Morris*, for appellee.

JORDAN, J.—Appellee, as trustee of Rollin Ellison, a bankrupt, commenced this suit against Susan M. Ellison to quiet title to certain real estate situated in Lagrange county, Indiana. After the commencement of the suit, appellants herein, Thomas E. Ellison, Susan B. Williams, Mary L. Bastian, Alice H. Ellison, Ellen M. Fountain, and Emma F. Casebeer, petitioned the court to be made defendants, averring in the petition that they were the owners of the undivided six-sevenths of the lands in controversy, and that the plaintiff was, as trustee of Rollin Ellison, the owner of the remaining seventh. The court granted the petition and ordered that the petitioners be made defendants to the suit.

Susan M. Ellison filed an answer of disclaimer, which, omitting the formal parts, is in these words: "Comes now Susan M. Ellison, the defendant in the above entitled cause, and for answer to plaintiff's complaint disclaims having any interest in or title to said property. She further says that prior to the commencement of this suit, to wit, on January 10, 1899, she was the owner of all said

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real estate; that on that day she conveyed the same to Rollin Ellison as trustee; that said Rollin Ellison as such trustee was, whenever a suitable purchaser was found therefor, to sell and convey the same to such purchaser, taking back such securities as trustee as would evidence the unpaid part of the purchase price thereof; that said Rollin Ellison was, by the terms of said trust, to divide the proceeds among this defendant's children in equal parts; that this defendant's children, who were and are entitled to receive the proceeds derived from the sale of said property, are [setting out the names of appellants herein], and they became at that time the equitable owners thereof. Wherefore she demands judgment for costs."

Subsequently appellee filed an amended complaint, making appellants party defendants thereto, in compliance with the order of the court hereinbefore mentioned. Therein he alleged that he was the duly appointed, qualified and acting trustee in the matter of Rollin Ellison, a bankrupt, in the proceedings in bankruptcy in the United States district court in and for the district of Indiana; that on September 18, 1903, said Ellison was by said court, on his voluntary petition, duly adjudged a bankrupt; that at and prior to the time that said Ellison was adjudged a bankrupt he was and ever since has been, and now is, the owner in fee simple of the following described real estate in Lagrange county, Indiana (here follows the description of the lands and lots in controversy); that at the time said Ellison was adjudged a bankrupt said real estate was, and still is, subject to the payment of the debts of said bankrupt, Rollin Ellison, and that the same is liable to be sold by plaintiff, as such trustee, to make assets for the payment of the debts, and that it is necessary for the plaintiff to sell the lands in question for said purpose. It is further alleged that the defendants to the suit claim an interest in said real estate adverse to the plaintiff's rights therein, which claim is unfounded and a cloud on plaintiff's title; that

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plaintiff has been by the United States district court in bankruptcy duly authorized to institute and carry on this suit. Wherefore he prays that the defendants' claim to said real estate be declared null and void, and plaintiff's title to the same be quieted.

The defendants, other than Susan M. Ellison, filed an answer to the amended complaint, which is denominated a partial answer. This answer may be said to be in the nature of a special or argumentative denial. Therein the defendants admit that Rollin Ellison was adjudged a bankrupt, as alleged in the complaint, and that appellee was appointed trustee of his estate. They further aver that said Rollin, in his schedule of the property which he filed, did not claim to own the real estate described in the complaint, but claimed that he held the same in trust; that the only title that said Rollin ever held in and to said property was by virtue of two deeds executed by Susan M. Ellison at a time when she was the owner of the property; that by said deeds she conveyed to said Rollin, for a nominal consideration, the following real estate situated in Lagrange county, Indiana (describing it), being the lands set out in the complaint; that at the time she executed said deeds she also executed in writing a declaration of trust by which he (Rollin) took title in trust to said property for the purpose of dividing the value thereof in equal parts among her children, he being one of her said children; that under said trust so declared he was granted authority to sell and convey said property as soon as he could find purchasers therefor, and was invested with power to take back to himself as trustee proper securities for the unpaid portion of the purchase money, which was to be divided among said defendants as her children; that said Rollin accepted said trust and agreed to carry the same out as directed; that Susan M. retained possession of the property, used and occupied the same, collected rents, made improvements thereon, and paid taxes; that one of said

tracts of land was sold to one Stevens, and Mrs. Ellison took and received the proceeds of such sale; and another small tract was sold to one Lovell, and she took and received the proceeds of such sale, all with the knowledge and consent of these defendants and of said Rollin Ellison; that on December 11, 1900, said Susan M. distributed among these defendants and beneficiaries the sum of \$700, derived by her from the sales and rentals of said property. It is further averred in said answer that on October 18, 1902, Rollin Ellison sold one of the tracts of land to William Appleman for the sum of \$800, and received therefor in his own name notes and a mortgage to secure that amount, and said notes and mortgage have passed into the hands of the plaintiff as trustee in bankruptcy, and the same are now in his hands, or have been collected by him and the funds thereby derived are in his possession. It is further averred that by the adjudication in bankruptcy said trust was terminated and the same cannot be further carried out or performed by said Rollin; that one-seventh of said property and the proceeds derived from the sale thereof belong to and are the property of said Rollin, and that each defendant is the owner of one-seventh, and all, jointly, own an undivided six-sevenths thereof; that a fair and equitable division cannot be made of said property so that the same can be divided between the plaintiff and these defendants, and that an accounting should be had and a commissioner should be appointed to take possession of said property and sell the same and divide the proceeds among and between the plaintiff and these defendants.

Appellee successfully moved to strike out all that part of the answer which related to the sale and conveyance of the tract of land to Appleman and the receipt by the trustee of the mortgage for \$800, and the collection of the proceeds thereof. Appellee filed a reply to this answer in two paragraphs. First, the general denial. By the second paragraph he alleges that the defendants "are estopped to

assert title to the lands described in their answer, or to obtain or secure the relief therein demanded, because said Rollin Ellison was, on September 18, 1903, and for many years prior thereto had been, engaged in the business of a private banker in the town of Lagrange, Indiana; that on the day aforesaid said Ellison filed, in the district court of the United States for the district of Indiana, his voluntary petition, praying to be adjudged a bankrupt, and on said day he was adjudged a bankrupt by said court; that thereafter, on October —, 1903, the plaintiff was duly appointed and qualified as trustee of said bankrupt, and still is acting as trustee, and as such is the owner of all of the property, real and personal, of said Rollin Ellison, for the benefit of all of his creditors, and of the property described in the answer of Susan B. Williams, Mary L. Bastian, Alice H. Ellison, Ellen M. Fountain, Emma F. Casebeer and Thomas E. Ellison;” that on January 10, 1899, while said Rollin Ellison was so engaged in the business of a private banker at the town aforesaid, Susan M. Ellison, who was his mother, and then the owner in fee of the lands described in the answer, conveyed the same to him by a general warranty deed; that this deed was executed and acknowledged by said Susan M. to Rollin, and was thereafter, on the — day of —, duly recorded in the record of deeds in the recorder’s office of Lagrange county, Indiana, with the knowledge and consent of the defendants; that the latter knowingly permitted this deed to be taken in the name of said Rollin and the title in his name to be so recorded and said deed to remain on the records of Lagrange county in his name; that they knowingly permitted the deed so to stand and remain of record in the name of Rollin Ellison for the purpose of giving him increased credit and financial standing in the community in which he was so conducting his business of a private banker; that among the customers of his bank many knew at and prior to the time of making deposits therein that

the title to said lands was in the name of Rollin on the public records of the county, but they had no knowledge, information, or notice of the declaration of trust executed by Susan M., or that the defendants had or claimed any title to or interest in said lots and lands until after the adjudication in bankruptcy of Rollin Ellison; that at and prior to the time of said adjudication there were more than two hundred customers of Rollin Ellison, who, at divers times, deposited sums of money with him as a banker, which deposits in the aggregate at the time of said adjudication in bankruptcy amounted to over \$300,000, in which amount he was indebted to said creditors and customers of his bank; that his property and assets at that time were wholly insufficient to pay said creditors, and were not sufficient to pay more than thirty or forty cents on the dollar of his indebtedness; that many of his creditors, knowing of the execution of said deed and that the title to said lots and lands stood in his name upon the public records of the county and believing him to be the owner thereof and relying on his ownership thereof, extended to him credit from time to time and made deposits in his bank in divers and various sums and permitted the same to remain in his said bank until his adjudication in bankruptcy.

It further alleges that Hartman D. Shoup, during the time said real estate stood upon the records in the name of said Rollin, made an examination of the records of the deeds and ascertained thereby that the real estate in controversy was still in the name of Rollin Ellison, and he believed said Ellison owned said real estate, and, not knowing of any interest, right, or title of the defendants therein by reason of any declaration of trust, and relying upon such ownership, on November 17, 1900, deposited in said bank \$1,694, and thereafter made other deposits, etc. Other allegations disclose the insolvency of said Rollin, his adjudication in bankruptcy, and it is alleged that said Shoup has filed his claim against the estate of Rollin Elli-

son and has been allowed thereon the sum of \$894, and that only ten per cent of the amount so allowed has been paid. It is alleged that, at the time the deposit of \$1,694 was made, the real estate described in the answer was, and is now, of the value of \$16,000, and, if the defendants are declared the owners thereof, said Shoup and other creditors of said Rollin will be deprived of the payment of their claims, "and his and their *pro rata* share thereof as creditors of said Rollin Ellison." It is further alleged that defendants, knowing that the deed had been executed to said Rollin and recorded as aforesaid, and that the title to the lands appearing upon the records in his name would give him increased financial standing and credit among the public generally, and especially among his creditors and depositors in said bank, permitted the title to remain in him from the time of the execution and of the recording of said deed until his adjudication in bankruptcy; that they kept silent said declaration of trust and gave out no notice or information concerning the same, either to the public or to said depositors and creditors of said Rollin Ellison. The plaintiff, therefore, avers that, by reason of the facts aforesaid, the defendants, and each of them, ought to be in equity estopped from setting up or asserting any title to or interest in said lands or lots, or any part thereof, as against the plaintiff and the creditors of said bankrupt estate, and for the further reason, as plaintiff avers, that the proceeds of the sale of said lands and lots, together with all the other estate assets owned and belonging to said Rollin Ellison at the time of his adjudication in bankruptcy, will be wholly insufficient to pay the debts of said bankrupt. Therefore the plaintiff demands judgment.

A demurrer for want of facts was overruled to the second paragraph of the reply. It appears that the defendants also filed a cross-complaint, wherein they allege *in extenso* facts to show the creation of the trust in the lands described in the complaint, therein setting out the deeds and

the declaration of trust executed by Susan M. Ellison to Rollin Ellison to the lands in question. This cross-complaint embraces, among others, substantially the facts alleged in defendants' answer to the amended complaint. Apparently the second paragraph of the reply was made to serve the purpose of both a reply to the answer and an answer to this cross-complaint. A general denial was filed by the defendants as a reply to the second and third paragraphs of the answer to the cross-complaint. Upon the issues joined there was a trial by the court, and, upon request, a special finding of facts was made and a statement of conclusions of law thereon given adversely to appellants. These conclusions are as follows: "(1) That Susan M. Ellison has no title or interest in the real estate. (2) That the cross-complainants have no title, claim, or interest in the real estate. (3) That Susan M. Ellison and the cross-complainants are all estopped to assert any title to the real estate, and that the title is in the appellee for the benefit of the creditors of Rollin Ellison. (4) That the plaintiff, as trustee, is entitled to a decree that the defendants have no claim in the property, and giving him the absolute title to the real estate."

The appellants reserved proper exceptions to each of these conclusions, and over their motion for a new trial, assigning among other reasons therefor that the findings of the court were not sustained by the evidence and that they are contrary to law, the court rendered a decree whereby it adjudged that the plaintiff, Sidney K. Ganiard, trustee in bankruptcy of Rollin Ellison for the benefit of all the creditors of said Ellison, is the owner of all the real estate described in plaintiff's complaint and in the cross-complaint of defendants, and further adjudged and decreed that defendants had no claim against or interest in or to said described real estate, and that any claim of the defendants thereto is without right and unfounded, and that plaintiff's title thereto, as above found and adjudged, be,

and the same is, hereby quieted and forever set at rest as against each and all of said defendants, or any of them, and against all persons claiming under them, or any of them. To reverse this judgment this appeal is prosecuted.

The errors assigned challenge the ruling of the court in denying the motion for a new trial, and also call in question certain other adverse rulings in respect to the pleadings in the cause, but, in view of the conclusion we have reached—that appellee, under the facts established, cannot maintain this suit—we may properly pass by the questions raised upon the pleadings and address ourselves to the consideration of the cardinal point involved.

At the very inception of the consideration of this appeal upon its merits we are confronted with the contention of appellee's counsel that appellants, in the prepara-

1. tion of their brief, have not complied with the rules of this court. While it may be said that their counsel have not fully regarded and adhered to our rules, still they appear to have endeavored at least substantially to comply with the requirements thereof.

It is further contended that the motion for a new trial is unavailable so far as it is sought thereby to question the sufficiency of the evidence to support the decision

2. of the trial court, or that it is contrary to law, for the reason that appellants, instead of employing in the motion the word "decision" as provided by subdivision six of §568 Burns 1901, §559 R. S. 1881, used the term "findings." This same point was raised and decided adversely to the contention of appellee in *Parkison v. Thompson* (1905), 164 Ind. 609, consequently this decision must rule the question here presented.

The facts material to the conclusion which we have reached, and which are established by undisputed evidence, may be summarized as follows: Rollin Ellison, for several years prior to the time of his being adjudged a bankrupt, carried on two private banks, one at Lagrange,

in Lagrange county, Indiana, and the other at Topeka, in said county. He received deposits in his banks and conducted a business generally pertaining to a banker. On September 18, 1903, upon his voluntary petition, he was adjudged a bankrupt by the United States district court within and for the district of Indiana, and on October 6, the same year, appellee was appointed trustee, and as such trustee took possession of all the property of said banker, real and personal. In the schedule filed by Ellison in the bankruptcy proceedings he stated that the title of the property which is described in appellee's complaint was in his name, but that it belonged to Susan M. Ellison, the sole devisee of Andrew Ellison, deceased. The schedules filed by the bankrupt disclosed real estate, not including that in controversy, belonging to him in the amount of \$31,875. There are 800 creditors of the bankrupt, seventy-five per cent of whom were his creditors for a year or over prior to the filing of his petition in bankruptcy. January 10, 1899, Susan M. Ellison, the mother of Rollin Ellison and of the appellants herein, was the owner of the property set out in appellee's complaint and to which he seeks to quiet his title. She was an elderly lady and not in very good health, and appears to have been desirous of distributing some of her real property among her children. She conveyed the lands in question to her son, Rollin, in order to avoid the necessity of her being troubled by making many deeds to carry her purpose or desire into effect. Accordingly, on January 10, 1899, she executed a deed, absolute on its face, to Rollin Ellison. This deed was recorded within forty-five days in the recorder's office of Lagrange county, Indiana. While a money consideration was recited in the deed, none, however, appears to have been paid, or was intended for said conveyance. On the same day upon which she executed this deed to her son Rollin, and as a part of the same transaction, she executed to him the following declaration in writing:

"Lagrange, Indiana, January 10, 1899.

To Rollin Ellison:

I have this day conveyed to you several tracts of land in Lagrange county, Indiana. The purpose of doing so is to divide the value thereof among my children in equal parts. You will sell and convey the same, as soon as you find a proper purchaser therefor, to such purchaser, taking back to yourself as trustee proper securities for the unpaid portion of the purchase price. As soon as you receive any money on said property, divide the same among my children in equal parts, and pay the same over to them, and their receipts therefor shall be in satisfaction of this trust.

Susan M. Ellison."

This declaration of trust was never recorded in the recorder's office of Lagrange county, but appears to have been kept in the safe in the bank of Rollin Ellison, in which his mother had other papers and documents, and was in this safe at the time of his adjudication in bankruptcy. At the time Mrs. Ellison executed this declaration of trust, Rollin Ellison, the trustee, signed the following acceptance, which was attached to said writing:

"I accept the above trust and promise to carry the same out as directed.

R. Ellison.

January 10, 1899."

The appellants in this case, together with Rollin Ellison, were at that time, and still are, the only children of Susan M. Ellison, and resided at the following places, and they do not appear to have changed their residences: Thomas E. Ellison at Ft. Wayne, Indiana; Mrs. Emma F. Casebeer in the state of Nebraska; Mrs. Ellen M. Fountain at South Bend, Indiana; Mrs. Susan B. Williams at Ann Arbor, Michigan; Alice H. Ellison at Lagrange, Indiana, and Rollin Ellison at the same town. The real estate conveyed consisted of a house and lot occupied by Mr. Deeter; also a pasture lot and several other lots and parcels of land, all situated in the town of Lagrange, of the value of \$5,000.

It does not appear that Rollin Ellison ever took any actual possession of the property, except that he looked after the rents, which, when collected, were turned over to Alice and his mother, and subsequently sent or distributed to her said children. Rollin Ellison, as it appears, during the time he held the lands in trust, sold and conveyed a part thereof, and the proceeds derived from the sales, together with the rents on hand, were distributed and divided among the beneficiaries of said trust by said trustee according to the provisions contained in said declaration.

There is evidence to show that Hartman D. Shoup, a township trustee residing in Lagrange county, in November, 1900, and from time to time thereafter, deposited moneys, held by him as such trustee, in the bank of Rollin Ellison. He testified that before making a deposit in the bank he made an inquiry at the recorder's office of Lagrange county, and ascertained that Rollin Ellison had in his own name various pieces of real estate, and various property holdings, which he, Shoup, estimated to be of the value of \$18,000 and over. That he relied upon the real estate holdings of Rollin Ellison and was induced thereby to make his deposits. At the time Ellison was adjudged a bankrupt he owed Shoup \$894.04, and the latter has received on this amount as a dividend \$89.40. Shoup was unable to give a description of any of the property which he saw standing on the record in the name of Rollin Ellison. He never spoke to Rollin Ellison in regard to what he discovered from the inquiry or examination which he made in the office of the county recorder, nor inquired of him as to what real estate he actually owned, nor did he make inquiry of Susan M. Ellison, or of any of appellants.

Another creditor of the bankrupt, William Walters, who had been treasurer of the county of Lagrange since 1902, testified that he was acquainted with Rollin Ellison's property so far as the same is and was shown upon the tax duplicate. On September 8, 1903, Rollin Ellison bor-

rowed from Walters, to be used for one day, \$1,000. This money is still owing and unpaid. Walters, upon being interrogated on the witness-stand as to what he relied on in making said loan to Rollin Ellison, said: "I relied upon what he had and upon his manner."

Aside from the creditors Shoup and Walters, there is no evidence to prove that any of the other 800 knew, at the time they became Rollin Ellison's creditors, that the deed of conveyance in question from Susan M. Ellison to Rollin stood upon the public records, disclosing that the title to the lands in controversy was held by him as his own, or that any of the creditors, other than Shoup and Walters, were in any manner induced or moved by that fact to deposit money in his bank or to make loans to him. No attempt appears to have been made at the trial to prove that the estoppel upon which appellee relied applied to or could be asserted by any of the creditors of the bankrupt other than the two heretofore mentioned. There is no evidence to prove that Susan M. Ellison conveyed the lands in dispute to her son for the purpose of giving him credit in securing loans or deposits in his bank. Save and except the fact that the deed in question was placed upon the public records without recording the declaration of trust, there is virtually no evidence to establish that the trust with which Rollin was invested was in any manner kept secret by him or his mother, or any of the appellants. In fact, it was shown that some of the latter notified tenants residing on a part of the property that it did not belong to Rollin Ellison; and there is no evidence to establish that any of the appellants in any manner gave out that Rollin was the owner of the property.

So far as the facts which we have set out are pertinent to the question of the trust in the lands involved in this case, we believe it may be said that they establish

3. that the conveyance of the real estate by Susan M. Ellison to her son Rollin, when considered in con-

nection with her written declaration, created an express trust in conformity with §3391 Burns 1901, §2969 R. S. 1881, which provides that "no trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing." In order to create the trust contemplated by this provision of the statute, it is not essential that the deed by which the settler or creator of the trust conveys the property to be effected thereby shall, as a part thereof, contain the written declaration in respect to the trust, but it will be a sufficient compliance with the statute if the trust can be shown or proved by any writing, either signed by the person who is to be charged therewith or by the party who, under the law, is empowered to create it, provided that such writing points out or discloses the *cestui que trust* or beneficiary intended and shows the terms, nature, and conditions of the trust with sufficient certainty to enable a court to carry it out in the manner intended by the creator thereof. *Gaylord v. City of LaFayette* (1888), 115 Ind. 423; *Ransdel v. Moore* (1899), 153 Ind. 393, 53 L. R. A. 753; *Nesbitt v. Stevens* (1903), 161 Ind. 519. Or, in other words, as the authorities affirm, the intention of the creator of the trust must in respect thereto be shown by the written document with such a certainty that nothing more can be done by the trustee except to carry into effect the intention or purpose of the settler without any further act or appointment upon the part of the latter. The written declaration of Susan M. Ellison in this case is sufficiently clear and explicit, and the beneficiaries thereof, her children, the natural objects of her bounty, are pointed out in such a manner that their names can be easily ascertained. As disclosed by the evidence, the trustee, Rollin Ellison, under his own hand, accepted the trust declared by his mother and agreed to carry it into effect as directed, and he, at least in part, prior to his adjudication in bankruptcy, had

proceeded to execute the power conferred upon him by the instrument in question.

Susan M. Ellison, in the written declaration, did not manifest or declare that her purpose or intention in conveying the lands to Rollin was to vest the title thereof in him absolutely as his own property, but, on the contrary, she positively states that the conveyance by her made to him is for the purpose of having the value of the property conveyed equally divided among her children, and, in order to carry this purpose more fully into effect, she invested him with the power to sell and convey the lands and to divide equally among her said children the proceeds received. Their receipts, to the extent of money which they received from the trustee, were to be deemed or considered a satisfaction of the trust created. It is true that, inas-

much as an absolute power to sell and convey was
4. conferred upon the trustee by the written declaration in question, the fee to the lands was lodged in him, otherwise he could not successfully have carried out the trust so far as he was required to do so by selling and conveying the lands to purchasers. *Ewing v. Jones* (1892), 130 Ind. 247, 15 L. R. A. 75.

It is true that §3393 Burns 1901, §2971 R. S. 1881, provides that the record of the trust "in the proper county shall be deemed actual notice thereof to every per-

5. son claiming under a conveyance made or lien created, after such recording." Section 3392 Burns 1901, §2970 R. S. 1881, declares that "no such trust, whether implied or created, shall defeat the title of a purchaser for a valuable consideration without notice of the trust." If the written document by which the trust was declared had been duly acknowledged and recorded in the recorder's office of Lagrange county within forty-five days, no question could have arisen between appellants and any of the creditors of Rollin Ellison, but the mere fact that the writing was not recorded did not in any manner break

down or impair the creation of the trust concerning the lands in controversy.

As the real estate in controversy in this suit was trust property, held by the bankrupt in trust for appellants at the time the proceedings in bankruptcy were insti-

6. tuted, consequently, under the law, it was not liable in any manner for the payment of his debts, excepting the interest which he held therein as one of the beneficiaries. It could not have been levied upon and sold under judicial process by any of his creditors in satisfaction of their claims, hence it did not pass to or vest in appellee as his trustee under §70 of the United States bankruptcy law. 30 Stat., pp. 544, 565, U. S. Comp. Stat., p. 3451. The general rule or test by which it is to be determined whether title to property passes to or vests in the trustee under this section is, could the particular property have been levied upon and sold under judicial process against the bankrupt? If it could, then it passes to his trustee in bankruptcy; otherwise it does not. Collier, Bankruptcy (5th ed.), p. 586, and authorities cited; Loveland, Bankruptcy (2d ed.), §174, and authorities cited; Brandenburg, Bankruptcy, §787.

While a trustee in bankruptcy may be regarded, to an extent, as a purchaser, he is, however, in no sense an innocent purchaser. He stands in the shoes of the bank-

7. rupt and takes the property and assets of the bankrupt which are unaffected by fraud, in the same condition as it was held by the bankrupt, and his taking thereof is subject to all the equities impressed upon it in the hands of the latter, except in cases where there has been a conveyance of, or encumbrance on, the property which is void against the trustee by some provision of the bankruptcy act. *In re Garcewich* (1902), 115 Fed. 87, 53 C. C. A. 510, and authorities cited; *Sellers v. Hayes* (1904), 163 Ind. 422.

It is insisted, however, by counsel for appellee that inasmuch as it appears from the deed of Susan M. Ellison to Rollin that he was the absolute owner of

8. the property, therefore appellee, his trustee, has a sufficient basis or title upon which he can predicate this suit. It is true that this deed, standing alone, shows upon its face that the conveyance was absolute, without any conditions imposed, but when the deed in question is read and considered, as it must be, in connection with the written declaration of trust, which was also introduced in evidence, all title which the bankrupt, or appellee as trustee, could set up thereunder against appellants is completely broken down and destroyed, and under the circumstances the deed affords no basis to maintain this suit.

But the contention is advanced that the trustee is entitled to predicate his right successfully to prosecute this suit upon the grounds that an estoppel against appellants

9. in favor of the bankrupt's creditors is established by the evidence by reason of the deed's having been permitted by appellants to remain on the public record during the time it did without their giving any notice or warning to persons loaning money to the bankrupt or making deposits in his bank that he was not the owner of the property conveyed to him. It is contended that appellee is invested with the power to assert this estoppel against appellants for the benefit of all the creditors of the bankrupt. But the facts established show that out of the 800 creditors, but two, Shoup and Walters, can be said to have any basis whatever for asserting or invoking the principle of estoppel against appellants. Conceding, for the sake of argument, without deciding, that these two creditors, under the evidence, have the right successfully to assert an estoppel against appellants, certainly these facts alone would not, under the law, justify appellee, as trustee, to maintain this suit and thereby, as he has succeeded in doing under the decree of the trial court, bring all of

the property in controversy into the estate of the bankrupt to be disposed of for the benefit of all of the insolvent's creditors. This proposition is so manifestly true that, it appears to us, nothing can be said to the contrary. A case which very much supports the proposition we assert is *Audenried v. Betteley* (1862), 5 Allen 382, 81 Am. Dec. 755. In that appeal it was claimed that a contract between the plaintiffs and the insolvent was made in order to enable the latter to obtain a false credit in conducting his business in the purchase of merchandise and the borrowing of money upon the strength of the possession of property which apparently belonged to him. It was held by the court that an assignment under the insolvency laws of the state of Massachusetts did not vest in the assignee title to property which had been placed in the hands of the insolvent for the fraudulent purpose of giving him a false credit, although some of his creditors may have been defrauded thereby.

The question of estoppel in that case, as in this, was

10. advanced by the parties and considered by the court.

Judge Hoar, in passing upon the question, said: "An estoppel *in pais*, on the ground of fraud, is personal to the particular creditor defrauded, and does not pass the property so as to inure to the benefit of creditors generally. As was said by Mr. Justice Curtis, in *Hawes v. Merchant* [1852], 1 Curtis C. C. 136, 144: 'To constitute such an estoppel, a party must have designedly made an admission inconsistent with the defense or claim which he proposes to set up, and another party have, with his knowledge and consent, so acted on that admission that he will be injured by allowing the admission to be disproved; and this injury must be coextensive with the estoppel.'" If the two creditors in question, or any other of the 800, has a right successfully to assert an estoppel against appellants, it is a matter personal to them, and they may avail themselves of such an estoppel, in a suit against appellants to subject the lands in question to the payment of their respective

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claims. It may possibly be suggested in passing that if any of the bankrupt's creditors are in a position successfully to assert an estoppel against appellants in such a suit, then the question might arise whether they can be said, under the law, to have a preference over the general creditors and in respect to their claim under such circumstances are not represented by appellee as trustee. But as to this question we intimate no opinion. See, however, *Sellers v. Hayes*, *supra*, and authorities there cited. It follows that, under the facts, upon no view of the case, can appellee's right to maintain this suit be upheld, and the finding of the trial court, sustaining his right in this respect, is not supported by the evidence and is contrary to law, and a new trial should be awarded. Other questions are discussed by counsel for appellants, but in consideration of the conclusion which we have reached we leave them undecided.

The judgment is reversed, and the cause remanded, with instructions to grant appellants a new trial.

FLINT & WALLING MANUFACTURING COMPANY
v. BECKETT.

[No. 20,877. Filed December 18, 1906.]

1. **TORTS.—Contracts.—Breach.—Action.**—A person engaged in a private enterprise whose only relationship with plaintiff grows out of a contract, may be liable in ~~tort~~ for damage committed in the execution of the work of carrying out such contract. p. 498.
2. **SAME.—Contracts.—Breach of Duties under.**—The breach of a contractual duty to use care in reference to another's property constitutes a tort the same as the breach of a legally imposed duty apart from contract. .p. 498.
3. **SAME. — Negligence.—Contracts.—Due Care.—Action.—Case.—Assumpsit.**—Where through contractual relations defendant enters upon a work attended with risk to the person or property of the plaintiff, a failure by defendant to exercise ordinary care therein entitles the plaintiff to an action on the case or in assumpsit at his election. p. 498.

167	491
168	403
167	491
169	644
167	491
171	470

4. **TORTS.—Negligence.—Contracts.—Action.**—A breach of a contract, unattended by any negligence, does not give rise to an action in tort. p. 498.
5. **SAME.—Negligence.—Contracts.—Breach.—Action.—Recovery.—Election.**—Plaintiff may elect to sue in tort or on contract for a negligent breach of contract, but he cannot have two compensations for the same loss. p. 499.
6. **SAME.—Assumpsit.—Origin of.**—The action of assumpsit historically developed from the enforcement of liability in tort. p. 499.
7. **NEGLIGENCE.—Due Care.**—Where damage results to plaintiff by reason of defendant's failure to exercise due care in any situation, an action in tort for the recovery of such damage lies on behalf of plaintiff. p. 499.
8. **SAME.—Erecting Windmill.—Dangerous Character.—Notice.**—Defendant company, which contracts to erect a windmill on plaintiff's barn, is liable for injuries caused by its failure to use ordinary care in fastening such windmill firmly, thus causing it to fall on plaintiff's barn to his damage, the defendant being chargeable with notice of the danger resulting from its negligence. p. 500.
9. **SAME.—Erecting Windmill.—Duty of Plaintiff to Examine.—Contracts.**—Where plaintiff sustained damages because of defendant company's negligence in performing its contract safely and securely to erect a windmill on plaintiff's barn, plaintiff was under no duty, as to defendant, to inspect such windmill to determine its safety. p. 501.
10. **SAME.—Proximate Cause.—Intervening Agent.**—Where the proximate result of defendant's negligence is damage to the plaintiff, the defendant is liable provided the line of causation is not broken by some intervening responsible agent. p. 501.
11. **SAME.—Selling Dangerous Articles.—Liability.—Intervening Agent.**—One who knowingly sells an article intrinsically dangerous to person or property, concealing the fact of its dangerous character, is liable to any person, who, without the fault of himself or other person sufficient to break the line of causation, is injured thereby. p. 501.
12. **PLEADING.—Complaint.—Negligence.—Erection of Windmill.**—A complaint showing that defendant negligently failed securely to fasten the windmill, which defendant had contracted to erect, to the tower of plaintiff's barn, thereby causing damage to plaintiff, need not show that the supports to such mill were defective. p. 502.
13. **NEGLIGENCE.—Contributory.—Erection of Windmill.—Failure to Inspect.—Contracts.**—The plaintiff is not guilty of contributory negligence for failing to inspect a windmill which de-

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fendant had contracted to erect in a safe and secure manner and which it had negligently erected to plaintiff's damage. p. 502.

14. PLEADING.—*Complaint.*—*Torts.*—*Contracts.*—*Consideration.*—*Inducement.*—While the averment of the consideration of a contract in a complaint for misfeasance or malfeasance is an uncontrolling mark of an action *ex contractu*, still, if the contract is set out merely as a matter of inducement, the complaint may be regarded as in tort for the violation of a common-law duty. p. 502.
15. SAME.—*Code.*—*Complaint.*—*Facts.*—*Torts.*—*Contracts.*—Under code pleading the plaintiff in a case of tort may properly set out the contract with defendant as constituting the underlying facts from which the violated duty springs, instead of alleging the undertaking in general terms. p. 503.
16. SAME.—*Complaint.*—*Torts.*—*Contracts.*—*Negligence.*—A complaint setting out a contract by defendant with plaintiff for the erection of a windmill upon plaintiff's barn, together with a supplemental agreement concerning same, and then, after making many different allegations of negligence, avers that by reason of such acts of negligence, without any fault upon his part, the plaintiff sustained damage, states a cause of action in tort, and not on contract. p. 503.
17. SAME.—*Complaint.*—*General Construction.*—Pleadings will be construed so as to give effect, if possible, to all of the material allegations. p. 504.
18. SAME.—*Complaint.*—*Construction by Trial Court.*—*Appeal and Error.*—A complaint whose allegations are such that it is doubtful whether it sounds in tort or in contract and which is tried upon the theory of an *ex delicto* action, will be so construed on appeal. p. 504.
19. EVIDENCE.—*Injury to Crops in Barn.*—*Negligence.*—*Erection of Windmill.*—*Damages.*—In an action for damages caused by the falling of a windmill negligently erected by defendant upon plaintiff's barn, evidence of the damage caused to plaintiff's crops stored in the barn is admissible. p. 504.
20. APPEAL AND ERROR.—*Briefs.*—*References to Transcript.*—Contentions as to the improper rulings of the trial court in admitting evidence may not be considered where the briefs fail to point out the pages and lines of the transcript where the same may be found. p. 504.
21. EVIDENCE.—*Hypothetical Questions.*—*Failure to Supply Evidence of Details.*—*Duty of Adversary.*—Where a party propounds an hypothetical question on his agreement later to supply the evidence of the details thereof, and he fails to supply

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same, it is his opponent's duty, in order to present error thereon, to move to strike out the answers thereto, after the close of such party's evidence. p. 505.

22. EVIDENCE.—*Receiving Incompetent, to Prove Established Fact.—Appeal and Error.*—The admission of incompetent evidence to prove a well-established fact in a case does not constitute reversible error. p. 505.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Wymond J. Beckett against the Flint & Walling Manufacturing Company. From a judgment on a verdict for plaintiff for \$1,100, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

Chambers, Pickens, Moores & Davidson, Shirts & Fertig and *Allen P. Vestal*, for appellants.

William S. Christian and *Wymond J. Beckett*, in *pro. per.*, for appellee.

GILLETT, J.—Appellee brought this action to recover damages for an injury to his barn and the contents thereof, owing to the fact that appellant constructed a windmill thereon in such an insufficient manner that it fell. As a number of the questions which this appeal involves depend upon the construction of the complaint, as to whether it is in tort or contract, our first undertaking shall be to state, so far as essential to an understanding of the question of construction, the substance of said complaint. The following facts are pleaded: Defendant is, and was on December 12, 1902, a corporation engaged in the manufacture, construction, and erection of windmills. Plaintiff was on said date the owner of a round barn, 100 feet in diameter and 34 feet high, measured at the eaves, with a conical roof, rising to a height of 70 feet. There was an air-shaft or duct in the center of said barn, extending from the bottom thereof to, and projecting through, the roof. The shaft was between four and five feet square, and was constructed of heavy timbers, braced at intervals with boards. On the

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day aforesaid, plaintiff contracted with defendant for the purchase and erection of a sixteen-foot windmill, to be erected on said air-shaft, if found sufficiently strong to support said mill. The contract was in writing, and is set out in the body of the complaint. By the terms of this contract appellant agreed to erect said mill on said barn, furnishing all labor and tools and necessary materials, except timber. The contract contained the following further provisions:

“The above outfit to be erected in a first-class manner, and will run and operate the machinery in an ordinary wind, and grind reasonably fast. All machinery set in proper position and started to work in good order. * * * The Star mill is constructed of good material, in a first-class manner, to withstand any storms that do not damage substantial buildings and other windmills in the vicinity.”

At this point we quote certain of the allegations of said complaint: “And plaintiff says that at the time he entered into the agreement and contract for the construction and erection of a windmill upon said barn, the construction of said barn, and the uses for and to which it was applied and used as aforesaid, were made known to the defendant herein; and that at said time the defendant had full knowledge of the construction of said barn, and the purposes for which it was to be used as herein alleged, and also, at the time of entering into said contract and the erection of said windmill upon said air-shaft as aforesaid, said defendant had full knowledge of the material and construction of said air-shaft, as aforesaid, and at the time of entering into said contract defendant agreed to examine said air-shaft and determine for itself its strength and sufficiency to hold said mill, and agreed to make or cause said shaft to be made sufficiently strong to hold said mill. And before defendant placed said windmill and tower upon said air-shaft, defendant examined said air-shaft and added or caused to be added additional braces and stays thereto, and pronounced

said air-shaft sufficiently strong to support said mill and tower, and then placed said mill and tower upon said air-shaft. * * * And plaintiff says that defendant did erect upon said barn and placed upon said air-shaft said power windmill, consisting of a wheel, tower, shafting, rods, and plates; and that said mill was erected upon said air-shaft, and completed on or about February 13, 1903, and plaintiff paid the agreed and stipulated price therefor." It is alleged that the windmill and the steel tower or frame weighed about 2,000 pounds. The complaint contains the following specifications of negligence: "And plaintiff says that defendant negligently constructed and erected said windmill upon said air-shaft as a tower or foundation for the same, without making or causing said shaft to be made sufficiently strong to hold the same, and negligently failed to fasten said tower securely to said air-shaft, in this, to wit, that the defendant negligently placed the foundation planks upon which the foot of said tower rested upon cross-beams upon said air-shaft, without nailing, bolting, or in any way fastening said foundation boards to said cross-beams; that defendant negligently failed and neglected to put lag-screws or bolts in the foot or base-plate of said windmill tower, as it was its duty so to do, and negligently failed and neglected to fasten said boards, upon which rested the foot of said tower as aforesaid, to said cross-beams upon which they rested as aforesaid, and negligently failed to nail said boards or bolt said boards together, and negligently failed to put any bolts or lag-screws through the base-plate which constituted the foot of said steel tower, and negligently placed said base-plate on boards that were defective and wind-shaken, but negligently attempted to fasten said steel tower to said air-shaft by means of four rods about three-quarters of an inch in diameter and about four or five feet in length; that the defendant negligently put one end of said bolt through the foot or base-plate of said steel tower, and negligently bent the other end of said

rod so that it passed through the vertical post of said air-shaft at right angles to the same; that defendant negligently fastened said tower upon which said windmill rested by means of said bent rods, and negligently failed to secure and fasten said steel tower by any other means or in any other way, and negligently used rods that were smaller than the hole in said base-plate, thereby allowing said base-plate to move about."

The complaint further alleges "that by reason of defendant's failure properly to fasten said steel tower upon said air-shaft as aforesaid, and without any fault or negligence on the part of this plaintiff, the wind bearing against said wheel of said mill caused said bent rods to straighten out, thereby loosening said tower, so that it worked up and down and from side to side upon the planks or boards upon which it was placed; that said rods, by means of said motion, wore the holes in said boards much larger than the size of said rod, and that, by continual wearing and motion, said tower became loose upon said boards, and said rods became straightened out to such an extent that they permitted the wind to weave said mill and tower about, and permitted said mill and tower to move about and wear said boards and stretch said rods and straighten the same, as aforesaid, and thereby loosened said mill to such an extent that a wind of ordinary velocity, and only sufficient to run said mill and cause the same to work and grind, as it was intended so to do, and not sufficient wind to destroy other substantial buildings in the neighborhood, and not sufficient wind to destroy and blow down other windmills in the same neighborhood, rocked said mill and twisted the same and caused the same to break and twist said air-shaft and fall about sixty feet upon the roof of said barn." It is also alleged that the plaintiff had no notice or knowledge of the faulty, negligent, and unskilful erection of the mill, and that "by reason of the defendant's negligence, carelessness, imprudence, and unskilfulness in erecting, constructing,

and fastening said steel tower to said air-shaft, the plaintiff has suffered, without his fault or negligence, great damages." The complaint then specifies various items of damage, and to these averments is added the following: "Total damage to this plaintiff by reason of defendant's negligence and failure of duty as herein alleged, \$2,778.64."

The leading contention of appellant's counsel is that the duty it owed to appellee arose out of contract, and that, as appellant was not engaged in a public employment,

1. its obligation could only be enforced by an action on the contract for a breach thereof. The latter insistence cannot be upheld. It is, of course, true that it is not every breach of contract which can be counted on as a tort, and it may also be granted that if the making of a contract does not bring the parties into such a relation that a common-law obligation exists, no action can be maintained in tort for an omission properly to perform the undertaking. It by no means follows, however, that this common-law obligation may not have its inception in contract. If

- a defendant may be held liable for the neglect of a
2. duty imposed on him, independently of any contract, by operation of law, *a fortiori* ought he to be liable where he has come under an obligation to use care as the result of an undertaking founded on a consideration.

Where the duty has its roots in contract, the undertaking to observe due care may be implied from the relationship, and should it be the fact that a breach of the agree-

3. ment also constitutes such a failure to exercise care as amounts to a tort, the plaintiff may elect, as the common-law authorities have it, to sue in case or in assumpsit. It is broadly stated in 1 Comyns' Digest, Action on the Case for Negligence, A 4, p. 418, that "if a man neglect to do that, which he has undertaken to do, an action upon the case lies. * * *

4. But, if there be not any neglect in the defendant, an action upon the case does not lie against him, though he do not per-

form his undertaking." Professor Pollock says: "One who enters on the doing of anything attended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against that risk.

To name one of the commonest applications, 'those who go personally or bring property where they know that they or it may come into collision with the persons or property of others have by law a duty cast upon them to use reasonable care and skill to avoid such collision.' * * *

In some cases this ground of liability may coexist with a lia-

5. bility on contract towards the same person, and arising (as regards the breach) out of the same facts. Where a man interferes gratuitously, he is bound to act in a reasonable and prudent manner according to the circumstances and opportunities of the case. And this duty is not affected by the fact, if so it be, that he is acting for reward, in other words, under a contract, and may be liable on the contract. The two duties are distinct, except so far as the same party cannot be compensated twice over for the same facts, once for the breach of contract and again for the wrong. Historically the liability in tort is older; and

indeed it was by special development of this view

6. that the action of assumpsit, afterwards the common mode of enforcing simple contracts, was brought into use. 'If a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well. * * * For it is the duty of every artificer to exercise his art rightly and truly as he ought.'" Webb's Pollock, Torts, 533-536. This general thought also finds expression in Mr. Street's valuable work (1 Street, Foundations of Legal Liability, 92). It is there said: "The general doctrine may be laid down thus: In every situation where a man undertakes to

act or to pursue a particular course he is under an

7. implied legal obligation or duty to act with reasonable care, to the end that the person or property of

others may not be injured by any force which he sets in operation or by any agent for which he is responsible. If he fails to exercise the degree of caution which the law requires in a particular situation, he is held liable for any damage that results to another just as if he had bound himself by an obligatory promise to exercise the required degree of care. In this view, statements so frequently seen in negligence cases, to the effect that men are bound to act with due and reasonable care, are really vital and significant expressions. If there had been any remedial necessity for so declaring, it could obviously have been said without violence to the principle that men who undertake to act are subject to a fictitious or implied promise to act with due care." See, also, *Howard v. Shepherd* (1850), 9 C. B. (67 Eng. Com. Law) 296, 321; *Coy v. Indianapolis Gas Co.* (1897), 146 Ind. 655, 36 L. R. A. 535; *Parrill v. Cleveland, etc., R. Co.* (1900), 23 Ind. App. 638; *Rich v. New York, etc., R. Co.* (1882), 87 N. Y. 382; *Dean v. McLean* (1875), 48 Vt. 412, 21 Am. Rep. 130; *Stock v. City of Boston* (1889), 149 Mass. 410, 21 N. E. 871, 14 Am. St. 430; *Bickford v. Richards* (1891), 154 Mass. 163, 27 N. E. 1014, 26 Am. St. 224; Addison, Torts (3d ed.), p. 13; 1 Thompson, Negligence (2d ed.), §5; 1 Shearman & Redfield, Negligence (5th ed.), §§9, 22; Saunders, Negligence, 55, 121; 6 Cyc. Law and Proc., 688.

The position in which appellant placed this large and heavy structure, located, as it was, upon the barn, some seventy feet above the earth, was such that it was

8. calculated to do great harm to appellee's property should it fall. We cannot doubt, in view of the terms of the contract, construed in the light of the practical construction which the parties gave to it, to say nothing of the extraneous agreement set forth in the complaint, that it was the duty of appellant to exercise ordinary care to secure the tower in such a manner that this heavy and exposed structure would not, under the action of ordinary

winds, weave around and become detached from the body of the air-shaft. Insecurely fastened, as the complaint shows that this structure was, appellant was bound to apprehend that it might fall, and that, if it did, great injury would thereby be occasioned to appellee. It was also bound to apprehend, from the very care and skill which it impliedly held itself out as exercising (a circumstance calculated to throw appellee off his guard), and from the fact that an examination was difficult, that in all probability the defects would not be observed in time to avoid the injury. Indeed, as laid down in *Mowbray v. Merry-*

9. *weather* [1895], 2 Q. B. 640, and *Devlin v. Smith* (1882), 89 N. Y. 470, 42 Am. Rep. 311, appellee owed no duty, so far as appellant was concerned, to examine the tower. The contrivance was inherently dangerous, and the circumstances of placing it upon the barn, as shown, made it calculated to eventuate in harm. This being true, and as there was no intervening responsi-

10. ble agency between appellee and the wrong, so that the causal relation remained unbroken, we can perceive no reason for acquitting appellant of responsibility; as a tortfeasor. See Wharton, *Negligence* (2d ed.), §438; 1 Beven, *Negligence* (2d ed.), 62; *Roddy v. Missouri Pac. R. Co.* (1891), 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. 333. It is not necessary to consider the extent to which contracts may impose obligations

11. to exercise care for the protection of third persons, for here the relation is direct and immediate, but we quote, as showing that there is clearly a liability in tort, in such a case as this, the following general statements in 1 Shearman & Redfield, *Negligence* (5th ed.), §117, with reference to the liability for selling dangerous goods: "But one who knowingly sells an article intrinsically dangerous to human life or health, such as poison, explosive oils or diseased meat, concealing from the buyer knowledge of that fact, is responsible to any person who, without fault

on the part of himself or any other person, sufficient to break the chain of causation, is injured thereby. And we see no reason why the same rule should not apply to articles known to be dangerous to property."

It is next objected that the complaint is bad because it is not alleged that the supports to the mill were defective.

While it might admit of question whether the pleading would be sufficient in this respect were the sole ground of complaint the failure to strengthen the air-shaft, yet it must be remembered that the complaint contains a number of specifications of negligence, and that in connection therewith it is clearly shown that defects did exist, particularly in the manner of fastening the tower to the air-shaft. So far as the objection under consideration is concerned, we may add that upon a critical examination of the complaint it appears that the accident was due, not to the failure to strengthen the air-shaft proper, but to the manner in which it was attempted to secure the tower thereon.

We find ourselves unable to acquiesce in the view that it appears, either from the complaint or the evidence, that appellee was guilty of contributory negligence.

13. Appellant assumed the obligation of properly erecting and securing the mill, and appellee had a right to rely upon the presumed superior knowledge of the agents of appellant that the mill would properly be secured, and, as shown, was not obliged to make search for the existence of original defects. We are therefore of opinion that appellee is not to be regarded as blameworthy because he failed to observe that his property had been endangered by the negligence of appellant.

A number of questions are argued by appellant's counsel which are based upon the contention that the theory of the complaint was that appellant had committed a

14. breach of contract. The latter insistence is based on the fact that the contract is set out in full in the

complaint. It is often difficult to determine whether, in the statement of such a cause of action as the one under consideration, wherein the very breach of the contract also constitutes negligence, the purpose of the pleader was to rely upon a breach of contract or to charge negligence in the violation of the implied duty which was created by the undertaking of the defendant. It is true that in an action on the case for negligence, wherein the declaration or complaint is not based on mere nonfeasance it is not necessary to plead a consideration, and, therefore, where the action is based on the manner in which an undertaking was performed, or, in other words, on some misfeasance or malfeasance, the allegation of a consideration may be regarded as one of the markings of an action *ex contractu*. But we do not understand that this is a controlling consideration; on the contrary, it does not appear to admit of question that if the contract or consideration be set out as a matter of inducement only, the plaintiff's action may be regarded as one in case for a violation of the common-law duty which the circumstances had imposed upon the defendant. 1 Chitty, Pleading, *135; *Dickson v. Clifton*, 2 Wils. 319; *Watson, Damages for Per. Inj.*, §570; 21 Ency. Pl. and Pr., 913. We are especially impressed with the

15. view that in code pleading, which was designed pre-eminently to be a system of fact pleading, a plaintiff, in suing in tort, may properly set out his contract, as constituting the underlying fact, instead of charging the defendant's undertaking in general terms, and that the plaintiff does not thereby necessarily commit himself to the theory that his action is for breach of contract. *Leeds v. City of Richmond* (1885), 102 Ind. 372; *Parrill v. Cleveland, etc., R. Co.*, *supra*; *McMurtry v. Kentucky Cent. R. Co.* (1886), 84 Ky. 462, 1 S. W. 815; *Watson, Damages for Per. Inj.*, §570. In the complaint before us appellee not only sets out the written contract, but

16. he pleads a supplemental or subsidiary agreement as well, so that it can hardly be said that he relied

on the written contract as the foundation of the action. He charges no breach of the contract except as it can be implied from the allegations of negligence; he alleges damages "by reason of the defendant's negligence, carelessness, imprudence, and unskilfulness in erecting, constructing, and fastening said steel tower to said air-shaft as afore-said;" he charges, in setting forth the total amount of his damages, that they were occasioned "by reason of the defendant's negligence and failure of duty as herein alleged," and he avers that he "had no notice or knowledge of the faulty, negligent, and unskilful erection of said mill," and that he himself was without fault or negligence in the premises. In view of the general structure of the complaint, and applying to it the rule that a construction

17. of a pleading which will give effect to all of its material allegations is to be preferred, where reasonably possible (*Monnett v. Turpie* [1892], 133 Ind. 424), it appears to us that it must be held that the action was for the tort. But, admitting that there is room for doubt on this subject, the fact that the court below,

18. as the record plainly shows, tried the cause on the theory that it was an action *ex delicto*, must settle the question against the contention of appellant. *Lake Erie, etc., R. Co. v. Acres* (1886), 108 Ind. 548; *Diggs v. Way* (1899), 22 Ind. App. 617.

There was no error in permitting appellee to prove the extent of the injury to his crops and agricultural implements, which were stored in the barn. Such dam-

19. ages were the natural and proximate result of the falling of the roof, and there can be no ground of objection to a recovery therefor. 1 Joyce, Damages, §90; 13 Cyc. Law and Proc., 28.

Several minor questions are presented concerning the court's rulings on the evidence. Of these we dispose thus:

Counsel have not referred us to the page and line
20. of the answer of the witness Woods, and we have been unable to find it; the question addressed to

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the witness Beals was proper cross-examination, and, there having been an undertaking subsequently to supply missing elements in an hypothetical question addressed to

21. certain of appellee's witnesses, there should have been a motion made after the close of appellee's evidence to strike out the answers. Indeed, we may say that the character of the evidence in this case is such that we would not be authorized to reverse for any possible

22. error in the reception of evidence relative to the fastening of the steel tower. Appellant's negligence in that particular stands out as a conspicuous fact in the case.

Judgment affirmed.

BARNEY ET AL. v. ELKHART COUNTY TRUST COMPANY, RECEIVER.

[No. 20,921. Filed December 18, 1906.]

1. **APPEAL AND ERROR.**—*Interlocutory Orders.*—*Time for Appeal.*—*Statutes.*—*Construction.*—No appeal lies from an interlocutory order, except by special statute; and such statute will be strictly construed. p. 506.
2. **SAME.**—*Interlocutory Orders.*—*Statutes Governing Appeals from.*—Appeals taken from interlocutory orders are governed by §658 Burns 1905, Acts 1905, p. 490, and §§659, 660 Burns 1901, §§647, 648 R. S. 1881, and not by the statutes providing for appeals from final judgments. p. 507.
3. **SAME.**—*Time Within Which Appeal May be Taken.*—*How Computed.*—Where a statute specifies the time within which an "appeal may be taken," all acts necessary to give the appellate court jurisdiction must be done within such time. p. 507.
4. **SAME.**—*Receivers.*—*Appointment.*—*Time for Appeal.*—*Statutes.*—Under §1245 Burns 1901, §1231 R. S. 1881, providing that appeals may be taken from orders appointing or refusing to appoint receivers, within ten days thereafter, such appeals must be perfected within such ten days. p. 507.

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5. **APPEAL AND ERROR.—Perfecting Appeal.—What Constitutes.**—Filing an appeal bond and obtaining an order from the trial court granting an appeal from an appealable interlocutory order does not constitute the taking of an appeal. p. 508.
6. **SAME.—Perfecting.—Interlocutory Orders.**—An appeal from an interlocutory order granting an injunction in term time must be perfected within such term by the filing of a bond, and the filing of the transcript on appeal, so as to give the Supreme Court jurisdiction over the interested parties; but if made in vacation such steps must be taken during such vacation or the succeeding term of the trial court. p. 508.

From Elkhart Circuit Court; *James S. Dodge*, Judge.

Suit by the Elkhart County Trust Company, as receiver of the American Mutual Life Insurance Company of Elkhart, Indiana, against William M. Barney and others. From a decree granting a temporary injunction, defendants appeal. *Appeal dismissed.*

Van Fleet & Van Fleet, for appellants.

Lou W. Vail and *James S. Dodge, Jr.*, for appellee.

MONKS, J.—This is an appeal from an interlocutory order made in term, granting an injunction against appellants.

Appellee has filed a motion to dismiss the appeal on the ground that the same was not perfected at the term of court at which the order appealed from was made. This motion must be sustained.

The rule is that no appeal can be taken from an interlocutory order unless there is a statute expressly providing therefor, and that such statute must be strictly con-

1. strued. *Natcher v. Natcher* (1899), 153 Ind. 368, 369, and authorities cited. Appeals in such cases “must be taken as the statute especially applicable to such cases provides.” Elliott, App. Proc., §§100-109.

This appeal therefore is not governed by §§644, 645, 650, 652-654 Burns 1901, §§632, 633, 638, 640-642 R. S.

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1881 and Horner 1901, and other sections providing for and regulating appeals from final judgments, but by §658 Burns 1905, Acts 1905, p. 490, and §§659, 660 Burns 1901, §§647, 648 R. S. 1881 and Horner 1901, which provide for and regulate appeals from certain interlocutory orders. Section 658, *supra*, provides that appeals may be taken from certain interlocutory orders, among which are orders "granting * * * an injunction in term, and granting an injunction in vacation." Section 659, *supra*, provides that "such appeals may be taken at the term of the court at which the order is made; or, when made in vacation, the appeal may be taken at the time or during the next term. The appeal shall not be granted until the appellant has filed an appeal bond, as in other cases of appeal." Section 660, *supra*, provides that "such appeal shall not stay proceedings upon the order more than thirty days, unless the Supreme Court in term, or some judge thereof in term or vacation, shall otherwise order."

It has been uniformly held by this court that when a statute provides that an "appeal may be taken" within a time fixed thereby, the appeal must be perfected

3. within that time; that is, "an appeal is taken" only when all the acts necessary to give the appellate court jurisdiction of the appeal have been performed, all of which must be done within the time fixed by the statute for taking the appeal. Elliott, App. Proc., §§100, 107, 109, 128; *Bank of Westfield v. Inman* (1892), 133 Ind. 287, 288; *Joyce v. Dickey* (1885), 104 Ind. 183; *Vance v. Schayer* (1881), 76 Ind. 194; *Hursh v. Hursh* (1885), 99 Ind. 500.

Section 1245 Burns 1901, §1231 R. S. 1881 and Horner 1901, makes provision in the following language for appeals from interlocutory orders appointing receivers: "In

4. all cases hereafter commenced or now pending in any of the courts of this State, in which a receiver

may be appointed or refused, the party aggrieved may, within ten days thereafter, appeal from the decision of the court to the Supreme Court, * * * upon the appellant[']s filing an appeal bond with sufficient security," etc. In *Vance v. Schayer, supra*, this court held that unless the appeal under said statute was perfected by filing a transcript in this court within ten days after the order appointing or refusing to appoint the receiver was made, the appeal would be dismissed on the ground that the "appeal was not taken" within ten days from the time such order was made.

It is evident that filing an appeal bond and obtaining an order of the trial court granting an appeal from the
5. appealable interlocutory order is not "taking an appeal" within the meaning of §659, *supra*.

Such "appeal is taken" under said section only when the same is perfected by filing the appeal bond required and taking all the steps necessary to give this court juris-

6. diction of such appeal, which must be done, if the interlocutory order appealed from was made in term, during the term at which the same was made, but, if made in vacation, at that time or during the next term of said court. *Elliott, App. Proc.*, §§107, 109; *Terre Haute, etc., R. Co. v. Indianapolis, etc., Traction Co.* (1906), *ante*, 193. It appears from the record that the interlocutory order appealed from was made in term time, that the appeal bond was filed and approved and the appeal granted by the court below at the same term of court, but the appeal was not perfected by filing the transcript and assignment of errors in this court until more than thirty days after the expiration of the term at which the order appealed from was made.

Appeal dismissed.

SHIRK, TRUSTEE, v. HUPP.

[No. 20,725. Filed June 22, 1906. Rehearing denied December 18, 1906.]

1. **PLEADING.—Complaint.—Theory.—Municipal Corporations.—Street Assessments.—Bonds.**—Whether a suit to enforce the lien of a contractor for street improvements is based upon the assessment made therefor or upon the bonds issued in payment thereof, as provided by §3623f Burns 1901, Acts 1901, p. 534, §6, is immaterial, such bonds being simply an evidence of such indebtedness. p. 510.
2. **SAME.—Motion to Make Specific.**—Where doubt exists as to the theory of plaintiff's complaint, a motion to make more specific is the proper remedy. p. 511.
3. **MUNICIPAL CORPORATIONS.—Street Assessments.—Collection.—Council's Right to Prescribe Method.**—An order of the city council that street assessments shall be collected as taxes are collected, is surplusage, since §3623f Burns 1901, Acts 1901, p. 534, §6, specifically prescribes the method of collection. p. 511.
4. **SAME.—Street Assessments.—How Questioned.**—Under §3623d Burns 1901, Acts 1901, p. 534, §4, defects in street assessments can be remedied only by a direct appeal to the circuit court from the order fixing same. p. 512.
5. **SAME.—Street Improvements.—Contracts.**—A general order for the improvement of a certain street in accordance with certain specifications is complied with when such street is made to conform to such specifications; and it is not necessary to change any part of such street that already conforms to such specifications. p. 512.
6. **SAME.—Street Assessments.—How Fixed.—Statutes.**—Under §3623c Burns 1901, Acts 1901, p. 534, §3, street assessments are made on the theory of special benefits received; and it is not unlawful to assess the cost of improving the east side of a street to frontagers upon such side, if they alone received special benefits therefrom. p. 513.
7. **SAME.—Street Assessments.—Collection of.—Attorneys' Fees.—Constitutional Law.**—Section 3623f Burns 1901, Acts 1901, p. 534, §6, providing for the recovery of attorneys' fees in cases of foreclosure of street improvement liens, is constitutional. p. 514.

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8. MUNICIPAL CORPORATIONS.—*Street Improvements.—Contracts.*
—*Notice.*—Where a city council adopted a resolution that it would receive bids for a street improvement “up to 6 o’clock, October 30,” and ordered its clerk to publish notice of the letting “for three weeks before October 6,” and the clerk published a notice for three successive weeks, that bids would be received up to “5 o’clock, October 30,” the first of which was published on October 1, and the last, on October 22, such notice is a sufficient compliance with the statute (§3623a Burns 1901). p. 514.
9. APPEAL AND ERROR.—*Briefs.—Striking from Files.—Unprofessional Language.*—Briefs containing unprofessional language will be stricken from the files. p. 515.

From Cass Circuit Court; *David D. Fickle*, Judge.

Suit by William Hupp against Elbert W. Shirk, trustee.
From a decree for plaintiff, defendant appeals. *Affirmed.*

George E. Ross, for appellant.

Nelson, Myers & Yarlott, for appellee.

HADLEY, J.—Appellee, as the contractor, instituted this suit to foreclose a lien against the real estate of appellant for the improvement of a street in the city of Logansport under the act of 1901 (Acts 1901, p. 534, §3623a *et seq.* Burns 1901). A demurrer to the complaint for insufficiency of facts was overruled, and the issue closed by a general denial. There was a trial by the court, and special findings and conclusions of law in favor of appellee. Appellant’s motion for a new trial, and to modify the decree were overruled. Error is assigned on all adverse rulings.

Appellant’s first objection to the complaint is that it is so drawn as to admit of two theories—that it is uncertain whether the plaintiff bases his action on the bonds

1. issued by the city in anticipation of the assessments for the improvement, or on the lien created by the assessment of benefits against the defendant’s property. It is entirely immaterial whether one theory or the other is intended by the plaintiff. He may sue upon the assessment and rely upon his statutory lien, or he may sue upon his bonds, which are nothing more nor less than evidence of the

indebtedness, and pursue the same statutory lien. §3623f Burns 1901, Acts 1901, p. 534, §6; *Scott v. Hayes* (1904), 162 Ind. 548.

Besides, if appellant was in doubt about how to answer, or how to present his defense, that doubt might have

2. been removed by a timely motion to make more specific.

A further objection to the complaint is that it shows upon its face that the common council in its order of assessment provided that it should be collected as taxes are col-

3. lected, and, having so provided, collection by foreclosure is contrary to the terms of the order, and therefore forbidden. If the council did so provide in the order, it was surplusage and without legal significance. The duty of the council ended with the making of the assessment. That body had nothing to do with the collection, or with the providing of a mode of collection. The legislature (§3623f, *supra*), specifically points out how collection of such assessments may be accomplished, as follows: "Such delinquent instalments shall be collected in the same manner that delinquent taxes are collected, or may be collected by foreclosure of the lien thereof in any court of competent jurisdiction, as a mortgage is foreclosed." The owner of the lien was entitled to choose between these remedies. We perceive no infirmity in the complaint and the demurrer thereto was properly overruled.

The initial resolution adopted by the common council declared generally that there existed a necessity for the improvement of North Fifth street between Linden avenue and Miami street, by grading and graveling the roadway forty-six feet wide and curbing the gutters four and one-half feet wide with boulders, the street to be brought to a proper subgrade and graveled to a depth of eighteen inches in the center and sloped to six inches at the gutters, all to be done in accordance with specifications and drawings on file in the office of the city engineer, in conformity to the

established city grade, and under the supervision of the city engineer.

It is shown by the findings that said improvement was accomplished by appellee under the direction of the city engineer and in accordance with the order and contract, and that in the performance all the work actually done by appellee, as contractor, was on the east half of North Fifth street between Linden avenue and Miami street; that the west half of said street had been, before the commencement of these proceedings, improved in accordance with said specifications, and paid for in full by the property owners on the west side; that the total assessment under these proceedings was laid against the property on the east side. Under these findings appellant insists that the court's conclusions of law in favor of appellee were erroneous (1) because the work done and sued for was not the work provided for by the ordinance or declaratory resolution, and (2) because the common council had no power to assess the total cost of the improvement, as benefits, to abutters on the east side.

By §3623d Burns 1901, Acts 1901, p. 534, §4, when an assessment is once made by the common council its validity cannot be questioned, except by a direct appeal to

4. the circuit court. This is quite a different action, but, since counsel have earnestly argued the questions last above stated, we have deemed it proper to consider them.

(1) The resolution in general terms called for the improvement of North Fifth street between Linden avenue and Miami street. The fair implication of the lan-

5. guage is that the full width and length of the street should be artificially constructed in conformity to the "specifications and drawings for the doing of said improvement on file in the engineer's office." It is not specified that every part of the street should be excavated and then refilled with gravel, eighteen inches in the center

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and sloped to six inches at the gutter. The resolution was satisfied, if, when the improvement was completed, every part of the street, to its full width and length, was found to be in a condition strictly in accordance with the specifications referred to, and that formed the basis of the contract. The law does not indulge in such folly as would demand a destruction of a part of the street that might be found in the condition required, without more substantial reason than that of imposing upon the contractor the burden of restoring it. The bids were received and contract let for so much per cubic yard for gravel, and so much per linear foot for bouldering the gutter, and if, under the guidance of the city engineer, as provided by the contract, it was found that the west half of the street was already satisfactorily improved, and that its condition in all ways met the requirements of the improvement order, we see no reason why an improvement of the east half, and the bringing of it to the same condition as the west half, did not accomplish an improvement of the whole street, and a substantial compliance with the resolution.

(2) In considering the fact that the cost of the improvement was all assessed as benefits against property on the east side of the street, it should be borne in mind

6. that this proceeding is under the act of 1901, *supra*, and the assessment of the cost is not made by the old front-foot rule, but upon the principle of actual, special benefits received. The act of 1901 applies only to cities "not operating under special charters." Logansport is a city of this class. The act provides (Acts 1901, p. 534, §3, §3623c Burns 1901) that after the improvement has been completed, and the costs thereof ascertained, the city engineer shall report these facts to the common council, which shall refer the report to the city commissioners, who "shall meet at the time and place fixed by the common council and shall proceed to view the lots, lands and parcels of ground affected by said improvement, * * * and assess

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the costs of said improvement upon the property *benefited thereby in proportion to the benefits derived therefrom, but not in excess of such benefits.*" (Our italics.) If the total special benefits thus ascertained are less than the cost of the improvement, the remainder shall be paid from the general funds of the city. Under said act the taxing district is limited only by accruing special benefits. All abutting lots and lands are not necessarily assessable; neither are all assessments necessarily confined to abutting property. The theory of this statute is to seek out the lots and lands that have received a particular and special benefit from the improvement, not common to nor shared by the other inhabitants of the city, and against such property lodge assessments of cost to the extent of such peculiar benefits, when necessary. And if it turns out, for any reason, that the special benefits resulting from a street improvement all fall on one side of the street, that side alone is assessable. The court did not, therefore, for this reason, err in holding the assessment valid.

The statute (§3623f, *supra*) provides for, and the court allowed plaintiff's attorney, a reasonable fee in the foreclosure decree. This, appellant claims was a viola-

7. tion of the Constitution. This court has decided to the contrary and we still adhere to the opinion heretofore announced. *Dowell v. Talbot Pav. Co.* (1894), 138 Ind. 675, 688; *Pittsburgh, etc., R. Co. v. Fish* (1902), 158 Ind. 525; *Judy v. Thompson* (1901), 156 Ind. 533.

Section one of the statute provides that the common council shall give notice of the letting of such contracts by three weeks' publication in a newspaper of general

8. circulation published within the city. Appellant claims that the notice given in this case was insufficient, and the letting of the contract illegal and void. In the declaratory resolution the common council fixed, as matter of record, that it would receive bids for the work up to 6 o'clock, October 30, 1901. An order to the clerk

directed him to cause notice to be published for the letting of the contract for three weeks before (as appears of record) October 6, 1901. The record further discloses that the city clerk proceeded to and did give notice pursuant to the order, that bids would be received up to 5 o'clock, October 30, 1901, the first of which publication was on October 1, 1901, and the last, on October 22, 1901.

Appellant argues that the notice given by the city clerk under the direction of the council is no notice at all, by the council, within the meaning of the statute, because not in accordance with the direction of the council. What instructions the clerk received from the council concerning notice is of little consequence. The essential things for the council to do with respect to the time for the letting of the contract were: (1) To fix the time, upon their record, for the letting of the contract; (2) to cause notice of the time and place of said letting to be given by publication for three weeks in a newspaper of general circulation in the city. As exhibited by the record, the time was fixed and the notice actually given as required by the statute, and the public thus afforded a fair and equal chance to bid, and in this respect it must be held to be a substantial compliance with the statute.

There are a number of other unimportant questions, chiefly relating to the sufficiency of the evidence to sustain particular findings, and to the admission and exclusion of evidence, each of which we have examined, and find no reversible error.

Judgment affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—For discourteous and unprofessional language used by appellant's counsel in his brief on

9. petition for rehearing, said brief is stricken from the files of this court, and the petition for a rehearing overruled.

CITY OF INDIANAPOLIS v. KEELEY.

[No. 20,752. Filed December 19, 1906.]

1. **PLEADING.—Complaint.—Municipal Corporations.—Streets.—How Alleged.**—A complaint showing that within the limits of defendant city there existed certain streets, among which was Martindale avenue, sufficiently shows that such avenue was a street within such city. p. 521.
2. **SAME.—Complaint.—Facts.—Duty Arising.—Municipal Corporations.—Streets.—Negligence.**—A complaint showing that plaintiff's injury was received because of a defect existing in a street in defendant city, is sufficient without any allegations showing defendant's duty with reference to such defect, such duty being a legal inference necessarily deducible from the facts, without any allegation thereof. p. 521.
3. **SAME.—Complaint.—Municipal Corporations.—Streets.—Defects. — Notice. — Contributory Negligence.** — A complaint against a city for negligence in maintaining a defective street, showing that plaintiff had no notice of the defect, that the accident happened in the dark and that plaintiff was without fault or negligence on his part, does not show contributory negligence. p. 521.
4. **SAME.—Complaint.—Negligence.—Contributory.—Allegation of Freedom from.**—An allegation in a complaint for damages for negligence, that plaintiff was without fault, is sufficient to negative negligence on plaintiff's part unless the other facts pleaded affirmatively show contributory negligence. p. 521.
5. **SAME.—Complaint.—Paragraphs of.—When not Considered.—Interrogatories to Jury.**—Where the answers to the interrogatories to the jury affirmatively show that the case was decided on the first paragraph of the complaint, the other paragraphs will not be considered on appeal. p. 522.
6. **MUNICIPAL CORPORATIONS.—Defective Streets.—Notice.—Choice of Ways.**—Where plaintiff received injuries by reason of a defective street, of which he had no notice, the fact that safe ways might have been taken by plaintiff is immaterial. p. 523.
7. **TRIAL.—Interrogatories to Jury.—Evidence to Overthrow.—Failure of Appellant to Point Out.—Appeal and Error.**—Where appellant complains that an answer to an interrogatory to the jury was incorrect, but fails to point out the evidence overthrowing same in his brief, the Supreme Court need not consider same. p. 523.

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8. TRIAL.—*Interrogatories to Jury.—Failure to Require Answer.—Harmless Error.*—The failure of the court to require the jury to answer more definitely an interrogatory does not constitute reversible error, where the answer would not, in any event, be of a controlling nature. p. 523.
9. SAME.—*Burden of Proof.—Contributory Negligence.—Want of Ordinary Care.—Municipal Corporations.*—The burden of proving contributory negligence and that plaintiff did not use care in proportion to the known danger in using a defective street, is upon the defendant city. p. 523.
10. SAME.—*Instructions.—Contributory Negligence.—Evidence.—Consideration of.*—The refusal to give an instruction, in an action for damages for negligence, that the burden of proving contributory negligence is on the defendant, but that the jury may consider the plaintiff's evidence in determining such issue, is reversible error, where no other instruction covers such ground. p. 524.
11. EVIDENCE.—*Res Ipsa Loquitur.—Municipal Corporations.—Defective Streets.*—The doctrine of *res ipsa loquitur* does not apply to injuries caused by defective streets. p. 525.
12. SAME.—*Presumptions.—Exercise of Due Care.*—There is no presumption in this State that the plaintiff, in a personal injury case, used due care. p. 525.
13. TRIAL.—*Negligence.—Contributory.—Issues.*—Where contributory negligence is relied upon, in a personal injury case, the parties virtually charge each other with negligence in respect to the transaction in question, and the burden is upon each to prove the negligence of the other. p. 525.
14. SAME.—*Negligence.—Contributory.—Evidence.—Presumptions.*—Negligence and contributory negligence are questions to be determined by the jury from the proved facts in a case, unaided by presumptions of law. p. 526.
15. SAME.—*Negligence.—Burden of Proof.*—Prior to the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) the burden was upon plaintiff, in a personal injury case, to prove defendant's negligence and his own exercise of due care. p. 526.
16. SAME.—*Negligence.—Want of Due Care.—Presumptions.*—Under the rule prior to the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) a failure, by the plaintiff in a personal injury case, to prove the exercise of due care, was fatal, since there was no presumption that he had exercised such care. p. 526.

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17. **EVIDENCE.—Negligence.—Burden of Proof.—Effect of Statutory Change of Rule.**—The effect of the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) was to relieve the plaintiff, in a personal injury case, from proving the exercise of due care. p. 526.
18. **SAME.—Burden of Proof.—Contributory Negligence.**—The defendant, in a personal injury case, to defeat plaintiff, must establish by a fair preponderance of the evidence the contributory negligence of plaintiff. p. 526.
19. **SAME.—Presumptions.—Nature of.**—Presumptions of law are inferences warranted by the experiences of the courts in administering justice, some of them being conclusive of a given proposition and some being only *prima facie* evidence thereof. p. 527.
20. **SAME.—Presumptions.—Inferences.**—Presumptions of fact are inferences of fact drawn by the experienced mind from the existence of other facts proved in a case, and such inferences or presumptions are questions for the jury. p. 527.
21. **APPEAL AND ERROR.—Reversal.—Errors.**—Where a judgment is reversed, the Supreme Court will not decide alleged errors not likely to arise again. p. 528.

From Johnson Circuit Court; *W. J. Buckingham*, Judge.

Action by Frank Keeley against the City of Indianapolis. From a judgment for plaintiff, defendant appeals. Appealed from the Appellate Court under subd. 3, §1337j Burns 1901, Acts 1901, p. 565, §10. *Reversed.*

Henry Warrum, Edward B. Raub, Linn D. Hay, Gideon W. Blain, Frederick E. Matson and Crate D. Bowen, for appellant.

Wymond J. Beckett and Elliott, Elliott & Littleton, for appellee.

MONTGOMERY, C. J.—Appellee brought this action for damages for personal injuries received on account of an alleged defect in one of the streets of appellant city. He recovered judgment in the trial court for \$15,000, which was affirmed by the Appellate Court, and an appeal therefrom taken to this court.

The errors properly assigned challenge the decision of the trial court in overruling demurrers to each paragraph

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of complaint, appellant's motion to make the second paragraph of complaint more specific, and its motion for a new trial.

The first paragraph of appellee's complaint is substantially as follows: That on October 23, 1897, for many years prior thereto, and ever since, the appellant was, has been, and is, a municipal corporation organized under the laws of this State; that at all times mentioned there was within its corporate limits a street, with sidewalks, known as Martindale avenue, situated in the northeastern portion of the city, and extending north and south, and intersecting at right angles streets running east and west known as Nineteenth, Twentieth and Twenty-first streets; "that beginning at a point just south of the south line of said Twenty-first street, and extending thence south, just along the east line of said Martindale avenue, there existed at the time before mentioned and for several years prior to that time a ditch, commonly known as the 'state ditch,' and for a distance of nearly a square from that point above stated said ditch extended along close to the east line of said Martindale avenue, so close as to infringe upon the line of the sidewalk of said avenue; that said ditch had steep banks, and it was on an average about twelve feet deep; that at a point south of said Twenty-first street the banks and bottom of said ditch, for a long distance, were filled with rocks of all shapes and sizes, and this condition was maintained at all times mentioned; that by reason of the fact that said ditch extended close to the east line of said Martindale avenue, as described, it was a menace to travelers along the east sidewalk of said Martindale avenue, and made the sidewalk along said avenue more than ordinarily dangerous to persons traveling along the east sidewalk of the avenue; that this condition of said avenue and said ditch had existed for at least two years prior to the time of the happening of the injuries to the appellee; that appellant knew, or by the exercise of reasonable diligence could have known, of the

dangerous condition of the sidewalk on said avenue at the place in question, and above fully described, long before the appellee was injured; that, notwithstanding the knowledge on the part of the appellant of the dangerous condition of said sidewalk as described, it negligently failed to place any barriers along the east line of said sidewalk, but left travelers to the danger of falling off said sidewalk into said ditch, and such danger to travelers could have been obviated by the erection of such barriers; that on the night of October 23, 1897, appellee got off of a street car on Nineteenth street, and proceeded home along the east sidewalk of said Martindale avenue; that he did not know of the dangerous condition of said sidewalk; that he was walking in an ordinarily careful manner, and when he reached a point just south of Twenty-first street the wind suddenly lifted his hat from his head, and he instinctively grabbed in order to save his hat; that as he did so he slipped or stumbled and pitched into the ditch aforesaid, by reason of the fact that the appellant had negligently allowed the same to exist close to said sidewalk without barriers or protection of any kind; that as appellee fell, as aforesaid, he fell from the sidewalk immediately into said ditch, which at that point was full of rocks, and he fell to the bottom thereof into the water in said ditch; that for many hours he remained unconscious, as a result of said fall, and was not rescued from his dangerous position until the next morning; that for many months he remained sick from exposure, and in the fall he crushed his left hip so that for a long time he had to walk on crutches, and as a result of said injury his left limb has become shortened, his hip joint destroyed, so that now he is permanently lame, and is disabled from caring for himself or doing any manual labor; that appellee received said injuries without any fault or negligence on his part."

In support of their contention that appellant's demurrer to this paragraph of complaint should have been sustained,

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counsel argue that there is no allegation that Martindale avenue was a public street or thoroughfare, and that no duty to appellee on the part of appellant is shown. The averment was that within the limits of appellant city there existed at and before the time of the accident certain streets, among which was one known as Martindale avenue. It is thus plainly charged that Martindale avenue was within the city limits, and was a street; and that term necessarily implies its public character without an express averment that it was a public street. *State v. Moriarty* (1881), 74 Ind. 103; *City of Columbus v. Strassner* (1890), 124 Ind. 482; *City of Indianapolis v. Higgins* (1895), 141 Ind. 1.

The complaint charges that the injury resulted from a defect in the street within the jurisdiction of appellant, and therefore the law supplied the power and imposed

2. the obligation upon it to maintain such street in reasonably safe condition for use by persons in the exercise of ordinary care. It necessarily follows that a duty to appellee is sufficiently shown.

It is further argued that there is no allegation that at the time of the accident it was dark and the ditch could not be seen, and that it appears from the complaint that

3. appellee was guilty of contributory negligence. The allegation is made that appellee did not know of the dangerous condition of the sidewalk, and that the accident occurred at night and without any fault or negligence on his part. This is clearly sufficient to repel the demurrer upon the grounds urged. In the case of *Town of Salem v. Goller* (1881), 76 Ind. 291, this court, by Woods, J., speaking of the averments of the plaintiff in a similar complaint, said: "The allegation that he was without fault,

4. like the general averment of negligence, has a technical significance, and admits proof of any facts tending to show its truth. This is an exception to the ordinary rule of pleading under the code, which requires the

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statement of the facts, rather than the conclusion deduced therefrom. In this respect, therefore, a complaint which contains this allegation is good, unless the other averments are such as to show affirmatively that the plaintiff was in fault." A like holding was announced in the following cases of the same character: *City of Ft. Wayne v. De Witt* (1874), 47 Ind. 391; *Murphy v. City of Indianapolis* (1882), 83 Ind. 76; *Town of Rushville v. Adams* (1886), 107 Ind. 475; *City of Elkhart v. Witman* (1890), 122 Ind. 538; *City of Franklin v. Harter* (1891), 127 Ind. 446; *City of Huntington v. McClurg* (1899), 22 Ind. App. 261. No contributory negligence is manifest upon the face of this paragraph of complaint, and appellant's demurrer thereto was rightly overruled.

The second paragraph of complaint is substantially like the first, except that no specific averment is made that appellee had no knowledge of the condition of the

5. street and sidewalk. The jury was required to answer seventy-three interrogatories, and by its answer to the sixteenth interrogatory expressly found that appellee did not know of the conditions, existence, and location of the ditch relative to the street and walk prior to the time of the accident. It is apparent that the verdict was grounded upon the first paragraph of complaint, and we are not required to determine the sufficiency of the second paragraph upon this appeal, or to review the court's ruling in refusing to require the same to be made more specific.

Appellant's motion for a new trial alleged that error was committed in refusing to require the jury to make specific answer to interrogatory twenty-six, in refusing to give certain instructions tendered, in giving each instruction given by the court upon his own motion, and in numerous rulings with regard to the admission and exclusion of evidence. The motion further alleged that the damages are excessive, and that the verdict is not sustained by sufficient evidence, and is contrary to law.

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Interrogatory twenty-six and the answer thereto are as follows: "Could not the plaintiff have passed along the opposite side of Martindale avenue in safety?

6. A. We do not know." We have already seen that the jury found appellee to be without any previous knowledge of the condition of the street and walk to which his injury was attributed, and with this fact established it is manifest that the doctrine of choice of ways was not applicable, and that he might have passed in safety some other way was immaterial, as it could not be claimed that, in the absence of knowledge of the defect, he voluntarily encountered the danger which produced his injury. *City of Muncie v. Hey* (1905), 164 Ind. 570.

Appellant has not pointed out the evidence to justify the answer desired, as it should have done, and for that

7. reason we might decline to pass upon the question presented. *Cincinnati, etc., R. Co. v. Gregor* (1898), 150 Ind. 625, 628.

But, since the fact, if found, that he might have gone safely another way was immaterial and not of controlling force, it is plain that the court did not err in refus-

8. ing to require the jury to make a more specific answer to this interrogatory. *Indianapolis, etc., R. Co. v. Stout* (1876), 53 Ind. 143, 160; *McElfresh v. Guard* (1869), 32 Ind. 408, 414; *McCormick, etc., Mach. Co. v. Gray* (1885), 100 Ind. 285, 292; *Chicago, etc., R. Co. v. Hedges* (1886), 105 Ind. 398, 409; *Hudson v. Houser* (1890), 123 Ind. 309, 317; *Indiana Stone Co. v. Stewart* (1893), 7 Ind. App. 563, 565; *Supreme Lodge, etc., v. Edwards* (1896), 15 Ind. App. 524, 528.

At the proper time appellant tendered and requested the court to give certain special instructions to the jury. We

shall not examine each of them separately, as we

9. are required to reverse the case, and in another trial many things will doubtless be eliminated of which

complaint is now made. The court, upon its own motion, by instructions numbered twenty-two, twenty-six, and thirty-one, charged the jury that the burden of proving contributory negligence, and that appellee did not use care in proportion to the known danger, or ordinary care, in traveling over the street or sidewalk in question, was upon appellant, and that these facts might be proved under the answer of general denial.

In this connection, appellant tendered at the proper time, and requested the court to give, the following instruction:

“(4.) If the plaintiff has proved the foregoing

10. things by a fair preponderance of the evidence, then he would be entitled to recover, unless it has also been shown by a fair preponderance of the evidence that the plaintiff was guilty of negligence which proximately contributed to the injuries complained of, in which latter case the plaintiff would not be entitled to recover. The burden is upon the defendant to prove negligence on the part of the plaintiff which contributed to the injury complained of, but if the evidence on the plaintiff's part should establish the negligence of the plaintiff, it would avail the defendant.”

The instructions so given by the court are vigorously assailed. It may be conceded that in themselves they are not misleading or erroneous, and yet it does not follow that the instruction tendered should not have been given. If the instructions given by the court had been accompanied by the one requested upon the same subject, the law with respect to the burden and the manner of proving contributory negligence would have been fully and accurately stated as heretofore decided by this court. *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489; *Town of Winamac v. Stout* (1905), 165 Ind. 365; *Indianapolis St. R. Co. v. Taylor* (1902), 158 Ind. 274. The instruction requested embodied a pertinent and correct statement of the law not

covered by any other instruction given, and appellant was entitled to have the same given as tendered, and the refusal to give said instruction was error.

This error was emphasized by the giving of erroneous instructions by the court upon its own motion, to the effect, that appellee was presumed to have used ordinary care in traveling over and upon the street or sidewalk in question. Instruction twenty-five, given by the court, was as follows: "It was the duty of the plaintiff, under the first paragraph of complaint, to use ordinary care in traveling over and upon the street or sidewalk in question, as alleged, and the presumption in this case is that he performed that duty and exercised ordinary care in traveling over and upon said street and sidewalk." Instruction thirty was the same in effect, but modified to apply to the issue joined upon the second paragraph of complaint.

This case does not belong to the class in which the doctrine *res ipsa loquitur* applies. In some jurisdictions where instantaneous death has resulted from alleged neg-

11. ligence, in the absence of any evidence to the contrary, the courts, as a matter of necessity, have sanctioned the indulgence of the presumptions of due care, founded upon the instinct of self-preservation. A
12. presumption of freedom from fault, even in cases of death, never existed in this State, and that doctrine in any event has no application to the present controversy. Appellee was present at the trial and testified in his own behalf, and all the facts relating to the accident were fully detailed to the jury.

Each party charged the other with negligence under the issues joined, and the alleged negligence of each was a matter for the determination of the jury from all the

13. facts and circumstances given in evidence, unaided by any presumption of law in favor of or against either party. In the trial of an issue of negligence, freedom from fault and the exercise of ordinary care cannot

- be presumed or inferred as a matter of law from
14. general conduct, or from the habits and instincts of mankind, or from the argument that men are likely to be careful in places of danger. It is a matter of common knowledge that men are careless as well as careful, and that they often negligently contribute to their own injury, and, on the other hand, frequently by the exercise of ordinary care avoid injury. Before the enactment of the statute of 1899 (Acts 1899, p. 58, §359a Burns 1901) the
15. burden was upon the party prosecuting an action for negligence as a necessary part of his case to establish affirmatively that the person so injured or killed did not by his own want of ordinary care contribute to produce the accident. In the application of the principle it was just as fatal to the cause of the plaintiff, if he
16. failed to show his freedom from fault, as if it affirmatively appeared that his own carelessness proximately contributed toward producing his injuries. A plaintiff under the former rule was not clothed as a matter of law with any presumption of care or of freedom from negligence, but upon the trial the inquiry was whether from the evidence, it appeared affirmatively, either directly or by inference, that he did not by his own fault contribute to the accident. *Toledo, etc., R. Co. v. Brannagan* (1881), 75 Ind. 490, 495; *Evansville St. R. Co. v. Gentry* (1897), 147 Ind. 408, 415, 37 L. R. A. 378, 62 Am. St. 421.

Section 359a, *supra*, does not attempt to create a presumption of law as to a contested issue, but only

17. relieves a plaintiff of the burden of showing affirmatively the negative fact that he is without fault proximately contributing to his own injury.

This statute makes contributory negligence a ground of defense, affirmative in character, and its existence must be established by a preponderance of the evidence to

18. defeat a recovery by a plaintiff injured through the negligence of another. The burden of showing con-

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tributory negligence is upon the defendant, but it may be established by a fair preponderance of the evidence upon that issue, and a defendant is not required to have a preponderance plus so much evidence as may be deemed necessary to outweigh and overthrow a presumption of law in favor of the plaintiff. Presumptions of law are such inferences

as are warranted by the legal experience of 19. courts in administering justice, and are usually founded upon reasons of public policy and social convenience and safety. Some of these presumptions have become so well established as to be conclusive as rules of law, while others are only *prima facie* evidence, and may be rebutted.

Presumptions of fact are inferences which enlightened common sense, and experience may draw from the connection, relation, and coincidence of facts and circum-

stances with each other. If the fact in question necessarily accompanies, or is usually associated with, certain other facts and circumstances, such associated facts and circumstances are admissible in evidence as tending to prove or affording the basis for an inference of the existence of the disputed fact. The so-called presumption of fact must always be drawn by the trial court or jury from the evidence, and the only presumptions of fact which the law recognizes are such immediate inferences as the court or jury trying the cause may reasonably draw from facts proved. The court, therefore, erred in giving instruction twenty-five, to the effect that appellee was presumed to be without fault and in the exercise of ordinary care at the time of the accident. *Union Mut. Life Ins. Co. v. Buchanan* (1885), 100 Ind. 63; *City of Columbus v. Strassner* (1894), 138 Ind. 301, 304; *Manning v. Insurance Co.* (1879), 100 U. S. 693, 25 L. Ed. 761; *Grand Trunk R. Co. v. Ives* (1892), 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Wiwirowski v. Lake Shore, etc., R. Co.* (1891), 124 N. Y. 420, 26 N. E. 1023; *Riordan v.*

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Ocean Steamship Co. (1891), 124 N. Y. 655, 26 N. E. 1027; *Rapp v. St. Joseph, etc., R. Co.* (1891), 106 Mo. 423, 17 S. W. 487; *Lee v. Knapp & Co.* (1893), 55 Mo. App. 390; *Chicago, etc., R. Co. v. Woolridge* (1897), 72 Ill. App. 551; *Missouri Pac. R. Co. v. Baier* (1893), 37 Neb. 235, 252, 55 N. W. 913; *Ellis v. Leonard* (1899), 107 Iowa 487, 78 N. W. 246; *Burk v. Walsh* (1902), 118 Iowa 397, 92 N. W. 65; *Bell v. Incorporated Town of Clarion* (1901), 113 Iowa 126, 84 N. W. 962; *Johnson v. Walsh* (1901), 83 Minn. 74, 85 N. W. 910; *McDonald v. Montgomery St. Railway* (1895), 110 Ala. 161, 20 South. 317; *McLane v. Perkins* (1898), 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487.

Many alleged errors have been discussed by counsel; but as they will probably not occur upon another trial, they will not be considered. The errors in refusing to give

21. instruction four as requested by appellant, and in giving instruction twenty-five, as heretofore set out, necessitate the granting of a new trial.

The judgment is accordingly reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings.

JACKSON v. MORGAN ET AL.

[No. 20,862. Filed October 3, 1906. Rehearing denied December 19, 1906.]

1. PLEADING.—*Complaint.*—*Replevin Bonds.*—The plaintiff in an action in replevin, for which action a third party alone executed the required bond, is not a proper defendant in an action on such bond for damages. p. 531.
2. REPLEVIN.—*Judgment.*—*Return of Property.*—*Damages.*—*Statutes.*—Section 558 Burns 1901, §549 R. S. 1881, providing that in actions for the recovery of personalty the jury must assess the value of the property and the damages for detention, when their verdict is for the recovery of such property, and §581 Burns 1901, §572 R. S. 1881, providing that judgment for

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either party in a replevin action, may be for the return of the property, or its value, in case return cannot be had, and damages for detention, contemplate that the verdict in replevin cases must settle the right to the custody of the property, its value, and the damages for detention. p. 532.

3. JUDGMENT.—*Res Judicata*.—*Replevin*.—*Damages*.—A judgment in replevin is conclusive upon the parties and their privies, in an action on the replevin bond, as to all matters capable of litigation under the issues. p. 532.
4. PLEADING.—*Answer*.—*Evidence Admissible under*.—*Replevin*.—Under an answer in denial, in a replevin case, the defendant may give in evidence any facts tending to defeat plaintiff's claim of title, or right of possession. p. 533.
5. REPLEVIN.—*Issues*.—*Return of Property*.—If the evidence under a general denial to plaintiff's replevin case shows defendant's right to the custody of the property, he is entitled to a judgment ordering a return thereof. p. 533.
6. PLEADING.—*Replevin*.—*Issues*.—A general denial to plaintiff's complaint in replevin raises an issue as to plaintiff's right of possession to the property, its value, and his damages for its detention. p. 533.
7. JUDGMENT.—*Res Judicata*.—*Replevin*.—*Failure to Find on all Issues*.—A failure of the verdict and judgment, in a replevin case, to show the value of the property and the damages for detention thereof, is not *res judicata* that there were none, in an action upon the replevin bond; and such questions remain open. p. 533.
8. SAME.—*Res Judicata*.—*Replevin*.—*Value of Property*.—A judgment for defendant in a replevin action for the return of the property, and, in case return is not made, for the value thereof, is *res judicata*, as to such value, in a subsequent action on plaintiff's replevin bond. p. 534.
9. SAME.—*Res Judicata*.—*Replevin*.—*Damages*.—*Time for Which Given*.—A judgment for damages, in an action of replevin, is *res judicata*, in an action on the replevin bond, as to the damages up to the time of the trial. p. 534.
10. REPLEVIN.—*Damages*.—*Elements of*.—The claim for damages, in an action in replevin, where there is a judgment for the return of the property, includes the value of such property as well as all other damages, such claim for damages being indivisible. p. 534.
11. JUDGMENT.—*Res Judicata*.—*Replevin*.—*Damages*.—Where defendant in a replevin action recovered a judgment for the return of the property, and, in case that could not be had, an

alternative judgment for the value thereof, a subsequent action for other damages accruing before such trial cannot be maintained. p. 535.

12. JUDGMENT.—*Defects.—Remedy.—Replevin.—Damages.*—Defects in the assessment of damages in an action in replevin cannot be corrected in a subsequent action on the replevin bond. p. 535.

From Hamilton Circuit Court; *Samuel R. Artman*, Special Judge.

Action by George W. Jackson against Joseph R. Morgan and others. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

Doan & Orbison and *Neal & Beals*, for appellant.

Daniel Wait Howe, Shirts & Fertig and *Charles E. Averill*, for appellees.

MONKS, J.—It appears from the record that in 1901 appellees Joseph R. Morgan and Louis J. Morgan commenced an action in the Marion Circuit Court against appellant to recover the possession of certain promissory notes. A replevin bond was executed by Selenia J. Morgan as surety, the plaintiffs in said action not joining therein. The notes were delivered to said plaintiffs by the sheriff. Appellant filed a general denial to the complaint, and a trial of said cause resulted in a verdict in favor of appellant, the defendant therein, and that said property was of the value of \$100. Judgment was rendered upon said verdict in favor of the appellant, the defendant in said action, for the return of said promissory notes, and for \$100, the value thereof, "in case return cannot be had," and for cost. Said judgment was affirmed on appeal. *Morgan v. Jackson* (1904), 32 Ind. App. 169. After the judgment was affirmed, appellant refused to accept the promissory notes when tendered, and Morgan and Morgan thereupon paid and satisfied the judgment, interest, and cost. Appellant afterwards brought this action on the replevin bond to re-

cover damages, including the amount of an alleged depreciation in the value of said promissory notes between the time of the taking thereof in the replevin action and the time of the trial of said action.

The court below held, on demurrer for want of facts, that the complaint was insufficient against Joseph R. and Louis

J. Morgan, because they had not joined in the exe-

1. cution of said replevin bond. This ruling was correct. *Borman v. Jung Brewing Co.* (1899), 23 Ind. App. 399; *Supreme Council, etc., v. Boyle* (1896), 15 Ind. App. 342. Selenia J. Morgan, the surety on said replevin bond, having died after the commencement of this action, the administrator of her estate filed an answer, alleging that in the replevin action the jury returned a verdict in favor of the defendant, the appellant in this action, and that "said property is of the value of \$100;" that judgment was rendered on said verdict in favor of said defendant for the recovery of said promissory notes, or, upon failure of said plaintiffs to return the same, that said defendant recover of them the sum of \$100, the value of the property "at the time of the trial," and for cost; that long before the commencement of this action the plaintiffs in said action tendered to appellant, the defendant in said action, all of said promissory notes, which he refused to accept, and thereupon the plaintiffs in said action fully paid and satisfied said judgment for \$100, interest and cost. Appellant's demurrer for want of facts to said answer was overruled, and, on his refusing to plead over, judgment was rendered against him. Appellant insists that said answer was insufficient, because, no damages having been assessed in the replevin action, he was entitled to recover the same in this action, citing *Yelton v. Slinkard* (1882), 85 Ind. 190, and *Whitney v. Lehmer* (1866), 26 Ind. 503.

Section 558 Burns 1901, §549 R. S. 1881 and Horner 1901, requires that, "in actions for the recovery of specific

personal property, the jury must assess the value of

2. the property, as also the damages for the taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property." Section 581 Burns 1901, §572 R. S. 1881 and Horner 1901, provides: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the delivery of the property, or the value thereof in case a delivery cannot be had, and damages for the detention;" that when the defendant is entitled to a return of the property, judgment for him "may be for the return of the property, or its value in case a return cannot be had, and damages for the taking and withholding of the property." It is evident that these sections contemplate that whether the verdict and judgment be for the plaintiff or defendant, for the recovery or return of the property, the value thereof, and all damages for its taking or detention, must be settled and determined in the action of replevin. *Noble v. Epperly* (1855), 6 Ind. 414, 415; *Tardy v. Howard* (1859), 12 Ind. 404; *Conner v. Comstock* (1861), 17 Ind. 90, 92, 93; *Chissom v. Lamcool* (1857), 9 Ind. 530, 532, 533; *Matlock v. Straughn* (1863), 21 Ind. 128; *Crocker v. Hoffman* (1874), 48 Ind. 207, 209, 210; *Anderson v. Lane* (1869), 32 Ind. 102; *Baldwin v. Burrows* (1884), 95 Ind. 81, 84, 85; 1 Works' Practice (2d ed.), §846, p. 552. See, also, *Teel v. Miles* (1897), 51 Neb. 542, 545. When-

ever there is a trial and judgment in an action of replevin,

the same is conclusive upon the parties, and their

3. privies, in an action on the replevin bond, as to all matters that were, or might have been, litigated under the issues. *Landers v. George* (1874), 49 Ind. 309, 321; *Smith v. Mosby* (1884), 98 Ind. 445, and cases cited; *McFadden v. Fritz* (1887), 110 Ind. 1, and cases cited; *Daniels v. Mansbridge* (1902), (Ind. Ter.), 69 S. W. 815; 1 Herman, Estoppel, §§125, 253. See, also, 1 Van Fleet, Former Adjudication, §133, pp. 359, 360; Cobbey, Re-

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plevin (2d ed.), §§1170, 1346; *Ellis v. Crawl* (1891), 46 Kan. 100; *Carroll v. Woodlock* (1883), 13 Mo. App. 574; *White v. Van Houten* (1873), 51 Mo. 577; *State, ex rel., v. Dunn* (1875), 60 Mo. 64, 71; *Hanlon v. O'Keefe* (1893), 55 Mo. App. 528, 532, 533; *Freeman v. Lavenue* (1903), 99 Mo. App. 173, 177, 72 S. W. 1085, and cases cited; *Drewyour v. Merrell* (1897), 112 Mich. 681, 71 N. W. 486.

Under the general denial, a defendant in an action to recover the possession of personal property may give in evidence anything that will tend to defeat plaintiff's

4. claim of title or right of possession. *Lane v. Sparks* (1881), 75 Ind. 278, and cases cited; *Aultman & Co. v. Forgey* (1894), 10 Ind. App. 397, 401-403, and cases cited; *Shipman Coal, etc., Co. v. Pfeiffer* (1895), 11 Ind. App. 445, 449, 450; 2 Works' Practice (2d ed.), §§1491, 1492; *Cobbey, Replevin* (2d ed.), §§752, 825; 1 Ency. Pl. and Pr., 822. Under such general denial, if the case made by the evidence authorizes a return of the
5. property to the defendant, he is entitled to such judgment. *Matlock v. Straughn, supra*; *Conner v. Comstock, supra*. As appellant filed a general denial in the action of replevin it is evident that the right of pos-
6. session of the promissory notes, their value, and the damages for the taking or detention thereof, were issues in said cause.

In *Whitney v. Lehmer, supra*, which was a suit on a replevin bond, by the defendant in the action of replevin, it appeared that he had only taken a judgment for

7. the return of the property, and that neither the value thereof nor the damages had been assessed or found, nor any judgment rendered therefor. The court held that as there had been no such assessment in the replevin action, "it does not follow that the property was of no value," and that the value thereof could be recovered in an action on the replevin bond for failure to return the property as adjudged by the court. In *Yelton v. Slinkard*,

supra, an action on a replevin bond by the defendant in the replevin action, in which there was verdict and judgment for the return of the property to the defendant, and cost, but no assessment nor judgment for its value, nor the damages for withholding it, the court held that if the property was not returned as adjudged a recovery could be had upon the bond for its value and damages. The court said, however, in *Whitney v. Lehmer, supra*: "An assessment of the value of the property in the replevin suit, and

8. a judgment in the alternative for its return or its value, would, as evidence, undoubtedly have bound the parties upon the question of value, for the reason that it would have been a judicial determination of that question by a tribunal having that authority, putting it at rest forever." In this case, however, the jury assessed the value of the property, which, as decided in *Whitney v. Lehmer, supra*, and cases cited, puts that question "at rest forever." Does the fact that the jury assessed, and the court adjudged, no damages except the value of the promissory notes in the action of replevin prevent appellant's recovering on the replevin bond any damages he might have recovered as such in the action of replevin?

It is evident, under the authorities cited in this opinion, that a judgment in an action of replevin for the return of the property to the defendant, or its assessed value

9. and damages and cost, in case return could not be had, fixes the measure of damages in an action on the replevin bond, where the property is not returned, at least as to everything before the trial of the cause. The claim for damages in the action of replevin, by

10. either party, when there is judgment for the recovery or return of the property, includes the value of the property, as well as the other damages to which he may be entitled. This claim is entire and indivisible, and a party cannot recover a part of it in one action and subsequently maintain an action for the remainder. *Daniels v. Mansbridge, supra*. Appellant recovered in the action of

replevin the value of the property, one of the items
11. of damages, if the property was not returned to him as adjudged. If there were other items of damages, the time for appellant to prove and have them assessed was when the action of replevin was tried. He has had his day in court, not only as to the value of the property, but as to all other claims for damages, at least to the time of the trial.

In *Daniels v. Mansbridge*, *supra*, decided by the court of appeals of Indian Territory, the defendant in the action of replevin, having obtained judgment for the return of the property, or for its value—\$1,167—in case return could not be had, and for costs, brought suit on the replevin bond, alleging that he was damaged by “the unlawful and wilful seizure, sale, conversion, and detention of said property in the sum of \$2,020.” Before the commencement of the action on said replevin bond, the plaintiffs in the replevin suit paid and satisfied the judgment, interest, and cost in said action of replevin. The statutes of said territory, as to the verdict and judgment in an action for the recovery of personal property, were the same as §§558, 581 Burns 1901, §§549, 572 R. S. 1881 and Horner 1901. Said court, quoting said statutes, held that, the judgment and cost having been fully paid and satisfied, no recovery could be had upon the replevin bond for such damages. It is not necessary for us to determine whether
the value of the property assessed by the jury

12. should be its value at the time of the trial, as in the replevin action in this case, or its value when taken on the writ of replevin, for the reason that, even if error were committed in assessing the value at the time of the trial, the same is conclusive on the parties and their privies so long as said judgment stands unreversed. It follows, therefore, that the court did not err in overruling appellant’s demurrer to said answer.

Judgment affirmed.

PRICE ET AL. v. HUDDLESTON.

[No. 20,856. Filed December 20, 1906.]

1. **APPEAL AND ERROR.**—*Precipe.*—*Oral.*—*Presumptions.*—Where a transcript, without a written precipe therefor, is filed on appeal, the presumption is that appellants orally requested the same, an oral request being legally sufficient. p. 537.
2. **SAME.**—*Transcript.*—*Precipe.*—*Failure to Include Parts Called for.*—*Dismissal.*—That the transcript on appeal does not contain copies of all of the records and papers called for by the precipe, is not a ground for dismissal of the appeal. p. 538.
3. **SAME.**—*Transcript.*—*Omissions.*—*Precipe.*—*Certiorari.*—Where parts of the record below, specified in the precipe, are omitted from the transcript; or where parts are omitted which are necessary to appellee's cross-assignment of errors, or in showing that appellant's assignment is harmless, the same may be supplied by a writ of *certiorari*. p. 538.
4. **SAME.**—*Transcript.*—*Omissions.*—Where the transcript contains enough of the record to present the questions raised on appeal, alleged omissions of other parts called for are harmless. p. 539.
5. **PLEADING.**—*Answer.*—*Sales.*—*Delivery of Worthless Goods.*—An answer showing that the plaintiff delivered goods, contracted for to be of a certain quality, which were at the time of shipment and have been at all times since "of no value, and wholly worthless, and for that reason the defendant refuses to accept the same," is sufficient as against a complaint for the contract price of such goods. *LaFayette Agricultural Works v. Phillips*, 47 Ind. 259, distinguished. p. 540.
6. **SALES.**—*Goods of Inferior Quality.*—*Retention.*—*Tender.*—*Recovery of Value.*—Where defendant contracted for a certain quality of goods, and plaintiff delivered an inferior quality thereof, and defendant received same and failed to return or to tender same back to plaintiff, defendant is liable for the actual value thereof. p. 541.
7. **PLEADING.**—*Answer.*—*Execution of Contract.*—*Fraud.*—An answer showing that defendant signed the contract sued upon, and that his signature was obtained by plaintiff's agent, without defendant's negligence and by means of a trick, the defendant thinking that he was executing a different contract, is sufficient as to a complaint for the enforcement of such contract. p. 541.

8. **TRIAL.**—*Instructions.*—*Incomplete.*—*Duty of Parties.*—Where an instruction is incomplete, but correct so far as it goes, the complaining party, to save any question thereon, must, at the proper time, present a complete instruction and request that it be given. p. 542.
9. **CONTRACTS.**—*Execution.*—*Fraud.*—*Relying upon Adverse Party's Representations of Contents of Writing.*—Defendant, who was able to read, cannot avoid his contract on the ground of fraud in plaintiff's misrepresenting to him the contents of such contract, where he had ample opportunity but failed to read the same. p. 542.
10. **SALES.**—*Goods.*—*Refusal to Accept Inferior Quality.*—Defendant has the legal right to refuse to accept goods inferior in quality, where his contract calls for a superior quality. p. 543.
11. **APPEAL AND ERROR.**—*Weighing Evidence.*—The Supreme Court will not weigh conflicting oral evidence. p. 544.

From Wabash Circuit Court; *A. H. Plummer*, Judge.

Action by Milbert F. Price and others against James Huddleston. From a judgment for defendant, plaintiffs appeal. (For opinion overruling motion to dismiss appeal, see 36 Ind. App. 450.) Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

Walter S. Bent, Thomas L. Stitt and R. P. Howell, for appellants.

W. G. Todd, for appellee.

HADLEY, J.—Action by appellants on a contract in writing, for the value of goods sold. The questions presented arise on the sixth and seventh paragraphs of answer, and on the overruling of appellants' motion for a new trial.

We are first met by appellee with a motion to dismiss the appeal: (1) Because there is no properly authenticated precipe in the record; (2) because there is

1. absent from the record certain papers and pleadings called for by the precipe. With respect to the precipe, there appears in the record, not immediately pre-

ceding the clerk's certificate, as required by the act of 1903 (Acts 1903, p. 338, §7, §641g Burns 1905), but at the head of the general bill of exceptions, what purports on its face to be a properly executed precipe, signed by the plaintiffs' attorney, and addressed to the clerk, calling for a complete transcript of the record for appeal. Appellee argues that the position occupied by the paper, and because there appears no file mark, and no entry or memorandum of the clerk, identifying the paper as a precipe filed in the case, we must disregard it, and treat the record as if no precipe had been filed; that is, as without proper authentication in this court. It is not necessary for us to consider the question here propounded; for assuming, without deciding, that there is no precipe in the record, its absence will not furnish a sufficient reason for dismissing the appeal, as under the statute, when a party desires a complete transcript for appeal, he may request the same of the clerk, either orally or in writing, as he may elect. *Workman v. State, ex rel.* (1905), 165 Ind. 42. And when a transcript appears here without a precipe we will presume the request was orally given to the clerk for a transcript that is full and complete. Elliott, App. Proc., §200.

Appellee's second reason for dismissal of the appeal is that the transcript does not contain copies of all the pleadings and rulings called for by the precipe. This

2. fact, as a general rule, furnishes no ground for dismissal. It is incumbent upon an appellant to bring here such a transcript as will fully show and present the error relied upon. If he fails in any part of his transcript to make the error of the trial court clearly manifest, he will fail in his appeal. As a rule, there is no ground for appellee to complain that the transcript is not full and complete. But it sometimes happens that parts important to the appellant's appeal, and parts necessary to the
3. use of appellee in making a cross-assignment of error, or in showing that the error against the ap-

pellant was harmless, and the like, are omitted from the transcript, by inadvertence or otherwise, in which case either party may have the record supplied or corrected by a writ of *certiorari*, but not dismissed. *Miller v. Shriner* (1882), 87 Ind. 141; *Ewbank's Manual*, §§22, 210; *Elliott, App. Pro.*, §216. The motion to dismiss the appeal is overruled.

In the formation of issues there were divers paragraphs of pleadings withdrawn, and carried out on demurrer, and in some instances it is not altogether clear what

4. state the record was in. In consequence of these things the transcript appears somewhat awkwardly framed, but the sixth and seventh paragraphs of answer to the only paragraph of complaint remaining in when they were filed are, with the complaint, clearly in the record, and, since they present all the questions raised on the pleadings, we need not concern ourselves about the remainder.

Better to comprehend the answers complained of, we subjoin the substance of the complaint. It is alleged that the defendant, James Huddleston, by his certain order in writing, dated February 10, 1904, a copy of which is attached as exhibit B, directed the plaintiffs to ship to him by freight certain jewelry, and a show-case, particularly described in exhibit B; that the plaintiffs accepted said order, and, pursuant to its terms, shipped the goods so ordered to the defendant by freight, on April 16, 1904, the purchase price of which remains unpaid. Exhibit B contains a list of articles and their prices, designated as "factory samples of rolled gold plate, gold front, and gold filled, sterling silver, and oxidized finished articles in assorted patterns," with terms of payment; also a stipulation that the plaintiffs would, at the end of thirteen months from date of shipment, on certain specified conditions, buy for cash, at original invoice prices, all goods remaining unsold. Also a guarantee of the goods for periods ranging

from five to twenty years, and a promise to replace any goods returned on account of defective workmanship or quality, and in consideration of which the merchant agrees not to claim a failure of consideration, or that the goods were not such as ordered, until he has exhausted the terms of the warranty and exchange. There were certain other conditions and stipulations, and the following order was appended:

“Puritan Manufacturing Company. Factory.

Please ship at your earliest convenience the goods listed in this order amounting to \$150, upon the terms named herein, all of which I fully understand and approve. Gentlemen’s line. Special attention to nice line emblem pins and buttons.

James Huddleston,
Owner of Store.

N. B. Marriott,
Salesman for Puritan Manufacturing Company.”

To this complaint appellee’s sixth paragraph of answer was that the goods shipped to him under the contract, as set out in the complaint, were, at the time of ship-

5. ment, and have been at all times since, of no value, and wholly worthless, and for that reason the defendant refuses to accept the same. We think the sixth paragraph of answer is good. It is responsive to the complaint, and alleges, in effect, that the goods shipped to him, under the contract, were not of the quality he contracted for, but were when shipped, and at all times since have been, of no value and wholly worthless, and for which reason he refuses to accept the same. It will be observed that this averment as to quality is general. If the allegation had been that the goods were worthless, or of no value, to the defendant, it would have been insufficient. *LaFayette Agricultural Works v. Phillips* (1874), 47 Ind. 259.

But a general averment that a thing is wholly worthless is equivalent to a declaration that it is entirely destitute

of value, and the delivery or tender of valueless goods under the contract in suit would amount to such a breach of the contract as would furnish a complete defense to an action for the purchase price. If the goods had been received, and were of any value, in the absence of a return or tender the plaintiff would be entitled to recover the amount of that value, even if the goods were not of the value and quality represented. *Dill v. O'Ferrell* (1873), 45 Ind. 268; *LaFayette Agricultural Works v. Phillips, supra*; *Cates v. Bales* (1881), 78 Ind. 285; *Arnold v. Wilt* (1882), 86 Ind. 367; *Fleetwood v. Dorsey Machine Co.* (1884), 95 Ind. 491; *Smith v. Borden* (1903), 160 Ind. 223, 230.

The seventh paragraph of answer is in substance as follows: The defendant admits he signed the instrument sued on, but was induced to sign it by the fraud of one

7. Marriott, an agent of the plaintiffs, who called upon him in his place of business, and proposed to sell him a quantity of jewelry, the same to be rolled gold plate, gold front, gold filled, sterling silver, and oxidized finish, manufactured by the plaintiffs. The defendant agreed to purchase some jewelry, and to sign a written order therefor, as proposed by Marriott, and thereupon the latter produced a printed paper and form which purported to be and was a simple order for the goods specified and nothing more, and was as follows:

"Puritan Manufacturing Company. Factory.

February 10, 1904.

Please ship at your earliest convenience the goods listed in this order, upon the terms herein named, all of which I fully understand and approve. Gentlemen, give special attention to nice line of emblem pins and buttons.

James Huddleston."

Said Marriott falsely and fraudulently represented to the defendant that said paper contained nothing more than a simple order for goods, and before the defendant signed

the same he carefully read said paper, and it contained an order for jewelry and nothing more, but by some unknown trick or artifice said Marriott substituted the contract in suit for said order for jewelry, and thereby fraudulently caused the defendant to sign said contract, without his knowledge, and without negligence on his part, he fully believing and intending at the time to sign only an order for said jewelry. This answer is ruled by the principle declared in *Cline v. Guthrie* (1873), 42 Ind. 227, 13 Am. Rep. 357, as follows: "The party whose signature to a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included." This doctrine has been often reasserted in this court. See *Webb v. Corbin* (1881), 78 Ind. 400, and cases cited; *Home Nat. Bank v. Hill* (1905), 165 Ind. 226, and cases cited.

Complaint is made of certain instructions to the jury. There is no fault found with any of them, as far as they go, but the complaint is that none of them fully

8. covers the subject to which it relates. This court has held many times that where an instruction is good as far as it goes, it will not be adjudged erroneous because it does not cover the subject as fully as it might have done. In such cases if the complaining party had desired a more specific and elaborate instruction on the particular subject, he should have prepared one, and, at the proper time, requested the court to give it to the jury.

The seventh paragraph of answer was not sustained by the evidence. The defendant failed to show any diligence whatever. The soliciting agent of the plaintiff

9. was a total stranger to him. He knew nothing of the plaintiffs as manufacturers of jewelry, he had never been engaged in the sale of jewelry, and testified he

could read, but relied upon the representations of the agent as to what the written and printed instrument contained, and did not read a word in it. Besides, there is a total absence of evidence that the plaintiffs' agent employed any fraud, trick, or device, or substituted one paper for another, to induce the defendant to sign the contract in suit.

With respect to the sixth paragraph of answer it should be remembered that, in effect, it sets up that the defendant refused to accept the goods consigned to him by the

10. plaintiffs, because they were not of the class or quality stipulated in the contract; that the goods so consigned were of no value and wholly worthless. This, we have held, was a sufficient answer. The question here is not one where inferior goods, though of some value, have been received and retained by the purchaser, without an offer to return them, but one where the purchaser refused to accept goods because not of the kind and quality contracted for. A party has the right to insist upon receiving what he buys. If A sells to B a horse, it is not a sufficient performance to tender him an ox. If, therefore, the defendant contracted for rolled gold plate, gold front, gold filled, sterling silver, and oxidized finished goods, and agreed to expose them for sale in his store, and try for thirteen months to sell them, and return to the plaintiffs for exchange all such goods as did not prove of good quality and workmanship, he could demand goods that came substantially within the class he bargained for. The law will not presume that he would have agreed to pay the same price for, or that he would have purchased and have undertaken to do the same by, a different class of goods. So if the goods consigned to the defendant were not substantially the same goods described in the contract, the defendant had a right to refuse to take them; and he will incur no liability under the contract until the plaintiffs have delivered or tendered such goods as they engaged to deliver.

The evidence is in sharp conflict upon facts set forth in the sixth answer. The plaintiffs gave testimony that the goods consigned were the identical goods described

11. in the contract, while on the other hand two experienced jewelers of the city testified to the contrary, one of them testifying that very little of the consignment was rolled gold, none gold front, none gold filled, and nine-tenths of it "stuff" that no responsible jeweler could afford to handle. Anyway, there was evidence both in support of and against the sixth paragraph of answer, and, having no power to weigh the evidence, we must leave the verdict of the jury undisturbed.

Judgment affirmed.

187 544
167 650

FARMERS MUTUAL FIRE INSURANCE ASSOCIATION ET AL. v. STEWART.

[No. 20,357. Filed December 20, 1906.]

1. **TRIAL.—Verdict.—General.—Special.—When Controlling.**—Answers to the interrogatories to the jury control the general verdict only when the conflict is so great that no evidence admissible under the issues could reconcile same. p. 546.
2. **MALICIOUS PROSECUTION.—Corporations.—Liability for.—Principal and Agent.**—A private corporation is liable for a malicious prosecution instituted by its agent, where such prosecution was authorized or ratified by it, or was within the scope of such agent's authority. p. 546.
3. **SAME.—Corporations.—Liability for Acts of Subagents.**—Where a subagent can be considered as the agent of a private corporation, either by reason of a permission given to appoint, or by the corporation's ratification of such subagent's acts, such corporation is liable for a malicious prosecution instituted by such subagent. p. 547.
4. **TRIAL.—General Verdict.—Malicious Prosecution.—Malice.—Want of Probable Cause.**—A general verdict for plaintiff in an action for malicious prosecution is a finding that defendant instituted the prosecution of plaintiff with malice and without probable cause. p. 547.

Farmers, etc., Ins. Assn. v. Stewart—167 Ind. 544.

5. **TRIAL.—Verdict.—Special.—Malice.—Want of.—Principal and Agent.**—An answer to an interrogatory to the jury, in an action for malicious prosecution against a private corporation and its agent, that there was no malice on the part of such corporation is a finding that such agent's acts, so far as such corporation was liable for same, were without malice. p. 547.
6. **MALICIOUS PROSECUTION.—Want of Malice.**—Malice is an essential element in an action for malicious prosecution; and the want of probable cause without malice is insufficient to sustain an action therefor. p. 547.
7. **SAME.—Principal and Agent.—Recovery against Agent Alone.**—Where an agent instituted a malicious prosecution against plaintiff, the plaintiff may recover against such agent although he fails to recover as against the principal. p. 548.
8. **APPEAL AND ERROR.—Reversal.—New Trial.—When Ordered.**—The Supreme Court may, on reversal, order a new trial when justice requires it, though the appellant is, on the answers to the interrogatories to the jury, technically entitled to judgment. p. 548.

From Superior Court of Allen County; *Owen N. Heaton*, Judge.

Action by James Stewart against the Farmers Mutual Fire Insurance Association and others. From a judgment for plaintiff, defendant association and another appeal. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed in part. Reversed in part.*

Barrett & Morris, W. G. Colerick and Robertson & O'Rourke, for appellants.

Henry Colerick and W. & E. Leonard, for appellee.

MONKS, J.—Appellee brought this action against appellant association and others to recover damages for malicious prosecution. The jury returned a general verdict in favor of appellee against appellants, and also found specially upon particular questions of fact, stated to them in writing in the form of interrogatories under §555 Burns 1901, Acts 1897, p. 128. Appellant insurance association filed a separate motion for a judgment in its favor against appellee on the answers to the interrogatories notwith-

standing the general verdict, which was overruled. Appellant Striefling filed a like motion, which was also overruled. Final judgment was rendered upon the general verdict for appellee.

The action of the court in overruling said motions is properly challenged by the assignment of errors.

The general verdict necessarily decided all material issues in favor of the appellee, and the motion for a judgment on the answers to the interrogatories notwith-

1. standing the general verdict can only be sustained when the antagonism between such answers and the general verdict is beyond the possibility of being removed or reconciled by any evidence legitimately admissible under the issues in the case. *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662; *Indianapolis St. R. Co. v. Johnson* (1904), 163 Ind. 518, 523; *Southern Ind. R. Co. v. Peyton* (1902), 157 Ind. 690, 697, and cases cited; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 300-302.

It is alleged in the complaint that appellant Striefling was employed by said insurance association to investigate and discover such facts as he could relating to such

2. fire and the occasion thereof, and as agent for and in the interest of said company did and performed the acts hereinafter alleged, "and that said insurance association and said Striefling," acting in concert and in union, maliciously and without probable cause" caused appellee to be prosecuted for the crime of arson as alleged in the complaint. A private corporation, like an individual, is liable for the acts of its agents in instituting a malicious prosecution, authorized or ratified by the corporation, or within the scope of the authority conferred. 1 Cooley, Torts (3d ed.), 200-205, 342-344; 10 Cyc. Law and Proc., 1203-1208, 1211, 1217; 19 Am. and Eng. Ency. Law (2d ed.), 691, 692; *Pennsylvania Co. v. Weddle* (1885), 100 Ind. 138, 140, 141; *American Express*

Co. v. Patterson (1881), 73 Ind. 430, 434; *Markley v. Snow* (1904), 207 Pa. St. 447, 451, 56 Atl. 999, 64 L. R. A. 685; *Carter v. Howe Machine Co.* (1879), 51 Md. 290, 34 Am. Rep. 311; *Beiswanger v. American, etc., Trust Co.* (1904), 98 Md. 287, 295, 57 Atl. 202.

As to liability for acts of a subagent, see 1 Clarke & Skyles, *Law of Agency*, §516, p. 1129; Mechem,

3. *Agency*, §197, p. 196; Story, *Agency* (9th ed.), §454a *et seq.*; *Lindsay v. Singer Mfg. Co.* (1877),

4 Mo. App. 571.

The general verdict, as we have shown, necessa-

4. rily found, as to the allegations of malice and want of probable cause, against each of the appellants.

The jury found, however, in answers to interrogatories, that there was no malice on the part of appellant insurance association in prosecuting the legal proceedings

5. against appellee complained of. This was equivalent to a finding that no person with whose acts said

insurance association was chargeable was guilty of any malice in what he did in the prosecution of the proceedings complained of by appellee.

It is evident that such finding was in irreconcilable conflict with the general verdict against said insurance association, for the reason that malice is an essential

6. element of malicious prosecution, and without it such action cannot be sustained. The want of prob-

able cause without malice is not sufficient. *Strickler v. Greer* (1884), 95 Ind. 596; *Terre Haute, etc., R. Co. v. Mason* (1897), 148 Ind. 578; *Helwig v. Beckner* (1897), 149 Ind. 131; *Paddock v. Watts* (1888), 116 Ind. 146-149, 9 Am. St. 832; *Wilkinson v. Arnold* (1858), 11 Ind. 45; *Newell v. Downs* (1847), 8 Blackf. 523; 19 Am. and Eng. Ency. Law (2d ed.), 673; 1 Jaggard, *Torts*, pp. 623-625; Hale, *Torts*, p. 358. It follows that the court erred in overruling said motion of appellant insurance association for judgment in its favor.

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While appellee was entitled under the allegations of his complaint to recover against appellant Striefling if the evidence showed that he prosecuted appellee mali-

7. ciously and without probable cause, as alleged in the complaint, as the authorized agent of said insurance association, he was also entitled to recover against said Striefling if what he did was not done as the authorized agent of said insurance association, but only on his own account. *Flora v. Russell* (1894), 138 Ind. 153. Under the rule stated there is no irreconcilable conflict between the jury's answers to the interrogatories and the general verdict against appellant Striefling, and the court did not err in overruling his motion for judgment in his favor.

The judgment is affirmed as to appellant Striefling, and reversed as to appellant insurance association, and upon the authority of *McCoy v. Kokomo R., etc., Co.*,

8. *supra*, and *Donaldson v. State, ex rel.* (1906), *post*, 553, and cases cited, the trial court is instructed to grant said insurance association a new trial.

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POLK v. JOHNSON, RECEIVER.

[No. 20,896. Filed October 3, 1906. Rehearing denied December 20, 1906.]

1. APPEAL AND ERROR.—*Jurisdiction*.—A motion to dismiss an appeal for want of jurisdiction requires the initial consideration of the court. p. 551.
2. SAME.—*Parties*.—*Receivers*.—*Owners*.—The owner, from whose possession his property is taken by a receiver duly appointed by the court, has a right of appeal from an order making an allowance from the proceeds of such property for the services of such receiver. p. 551.
3. SAME.—*Parties*.—*Vacation Appeal*.—*Dismissal*.—A vacation appeal from an allowance made by the court to a receiver for his services, taken by the former owner of the property involved in such receivership, will be dismissed where the receiver was not made a party thereto. p. 551.

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4. **APPEAL AND ERROR.**—*Time for Taking.*—*Judgment.*—*New Trial.*—Where final judgment was rendered April 1, and a new trial was denied May 17, appellant has one year from the latter date within which to perfect his appeal. p. 552.
5. **SAME.**—*Parties.*—*Substitution of, after Period for Appeal has Elapsed.*—Necessary parties to a vacation appeal, omitted from the notices of appeal and from the assignment of errors, cannot, with or without their consent, be substituted after the year for perfecting the appeal has elapsed, since there is a want of jurisdiction. p. 552.

From Johnson Circuit Court; *Vinson Carter*, Special Judge.

Claim for services by Grafton Johnson, as the receiver of the property of James T. Polk, against which James T. Polk excepts. From an allowance of \$9,500, the exceptor appeals. Appealed from Appellate Court under subd. 3, §1337j Burns 1901, Acts 1901, p. 565, §10. *Appeal dismissed.*

L. Ert Slack, L. J. Hackney, Charles F. Coffin and Wilson & Townley, for appellant.

Miller, Shirley & Miller, R. M. Miller, H. C. Barnett and E. A. McAlpin, for appellee.

MONTGOMERY, J.—Appellee filed his resignation and report as receiver of appellant's property, in which he asked an allowance of \$20,000 for services, to which appellant excepted. A part of the exception was stricken out on appellee's motion, for which error the judgment was reversed by this court. *Polk v. Johnson* (1903), 160 Ind. 292. Appellee's resignation was accepted, and the Central Trust Company appointed and qualified as his successor, and upon the return of the cause to the court below appellee replied to appellant's exception by general denial and by affirmative allegations. Appellant's demurrers to the affirmative paragraphs of reply were overruled. A trial upon the issues so formed resulted in the following judgment: "And the court, having duly considered the evidence in the case, does now find that the exception filed by

said James T. Polk to the amended final report of Grafton Johnson, receiver, heretofore filed in the case, contesting an allowance for compensation in the amount of \$20,000, asked for by said Johnson in said report, as to the sum of \$10,500, part and parcel of said \$20,000, said exception ought to be and the same is hereby sustained, but that as to \$9,500, the remaining part and parcel of said claim, said exception is overruled; and the court doth further find that compensation to the amount of \$9,500 ought to be and the same is hereby allowed to said Grafton Johnson for his services in said receivership, in addition to what has heretofore been allowed; and it is further ordered, adjudged, and decreed by the court that said Grafton Johnson be, and he is hereby, allowed the sum of \$9,500 as additional compensation in full for services rendered in said receivership, and the present receiver, the Central Trust Company of Indianapolis, Indiana, be, and it is hereby, ordered and directed to pay said sum of \$9,500 to said Grafton Johnson as such compensation, taking his receipt in full therefor. And it is further ordered that the costs of the proceedings upon the exception to said report be paid out of the funds of the trust."

Appellant prosecuted an appeal from this judgment to the Appellate Court, which court overruled appellee's motion to dismiss the appeal and affirmed the judgment. A further appeal to this court has been taken, and it is urged that the circuit court erred in overruling appellant's demurrers to the affirmative paragraphs of reply, and in overruling his motion for a new trial.

Appellee has properly presented his motion to dismiss the appeal, and insists that the same should be sustained, for the reasons (1) that appellant is not the real party in interest, and (2) because there is a defect of parties, in that the Central Trust Company, the receiver against whom the judgment was entered, has not been joined as a party.

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The motion to dismiss challenges our jurisdiction, and demands primary consideration. A term-time ap-

1. peal was prayed but not perfected, and this is a vacation appeal in which no effort has been made to join the Central Trust Company as a party.

We are of opinion that appellant is shown by the record to have such an interest in the subject-matter in litigation and in the final judgment as entitled him to prose-

2. cute a proper appeal, and that the first ground of appellee's motion cannot be sustained. *Brooks v. Dozey* (1880), 72 Ind. 327. The judgment from which this appeal was taken was rendered against the Central Trust Company as receiver. The receiver repre-

3. sents the interests of creditors as well as those of the embarrassed debtor, and an orderly administration of his trust requires such receiver to be a party to every proceeding affecting the estate in his custody. The right of appeal is wholly statutory, and our statutes authorizing appeals require all persons named in and affected by a judgment from which a vacation appeal is taken to be made parties. The Central Trust Company, as receiver, was a necessary party to this appeal, and failure to join it is ground of dismissal. *Moore v. Ferguson* (1904), 163 Ind. 395; *Christ v. Wayne, etc., Assn.* (1898), 151 Ind. 245; *Stults v. Gibler* (1897), 146 Ind. 501; *Roach v. Baker* (1896), 145 Ind. 330; *Shuman v. Collis* (1896), 144 Ind. 333; *Lee v. Mozingo* (1896), 143 Ind. 667, and cases cited.

The appeal is accordingly dismissed.

ON PETITION FOR REHEARING.

MONTGOMERY, C. J.—Appellant insists, on petition for a rehearing, that our decision holding the Central Trust Company as receiver to be a necessary party to this appeal is erroneous. We have again examined the question, and find no reason to depart from that holding.

It is further urged that, if the trust company was a necessary party as held, it voluntarily appeared and asked to be made a party of record, and for that reason

4. the appeal should be reinstated. The final order or judgment from which the appeal was prosecuted was rendered April 1, 1904, and appellant's motion for a new trial was overruled May 17, 1904. All steps necessary to perfect the appeal should have been taken within one year from the latter date. The Central Trust Company, receiver, a necessary party, was not joined. October 2, 1905, appellee filed his motion to dismiss the appeal on the ground of a defect of parties, and thereupon

5. the trust company filed its appearance and request to be made a party. This was about six months after the expiration of the time allowed in which to perfect the appeal. No order was made by the Appellate Court upon this application, nor was the assignment of errors at any time amended so as to make the trust company a party thereto. The motion to dismiss could not be defeated by an appearance at that time, as after the lapse of the year given in which to appeal the Appellate Court could not acquire jurisdiction of a necessary party, and it made no attempt so to do. *Holloran v. Midland R. Co.* (1891), 129 Ind. 274; *Lilly v. Somerville* (1895), 142 Ind. 298; *Abshire v. Williamson* (1898), 149 Ind. 248; *Michigan Mut. Life Ins. Co. v. Frankel* (1898), 151 Ind. 534; *Nordyke & Marmon Co. v. Fitzpatrick* (1904), 162 Ind. 663.

It follows that the motion to dismiss was correctly sustained, and the petition for a rehearing is overruled.

167 553
167 548

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**DONALDSON ET AL. v. STATE, EX REL. TAYLOR,
ATTORNEY-GENERAL.**

[No. 19,798. Filed June 8, 1906. Rehearing denied December 20, 1906.]

1. **ALIENS.—Residence.—Presumptions.**—The propositions that (1) a man is domiciled where found, unless shown to be there for a temporary purpose; (2) a stronger presumption exists that a man is domiciled where he dies; (3) an alien's original domicile instantly reverts upon his return thereto, and (4) the original domicile prevails in cases of doubt, are disputable presumptions of fact only and not of law. p. 555.
2. **TRIAL.—Special Findings.—Aided by Presumptions.—Failure to Find Material Fact.**—A special finding cannot be aided by presumptions, inferences or intendments; and a failure to find a material fact is a finding against the party having the burden of proof. p. 557.
3. **SAME.—Special Findings.—Aliens.—Domicile.**—A special finding showing that decedent was born in Scotland in 1811, removed to United States in 1860, became a resident of Indiana in 1865, remained there until 1883 when he became a resident of Alabama, returned to Scotland in 1896 and died there in 1898, is not a finding that decedent was a resident of Scotland at the time of his death. p. 558.
4. **APPEAL AND ERROR.—Theory of Trial Court.—Abandonment of, on Appeal.**—The parties to a cause on appeal will be held to the theory upon which the caused was tried below. p. 558.
5. **SAME.—Reversal.—When New Trial Ordered.**—Where justice requires, a new trial will be ordered, though appellant may be technically entitled to judgment on the special findings. p. 558.

From Lawrence Circuit Court; *William H. Martin*, Judge.

Action by the State of Indiana, on the relation of William L. Taylor, as Attorney-General, against James Donaldson and others. From a judgment for plaintiff, defendant appeals. *Reversed.*

Baker & Daniels, for appellants.

Donaldson v. State, *ex rel.*—167 Ind. 553.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *L. G. Rothschild*, *W. C. Geake*, *Rowland Evans*, *Merrill Moores* and *Brooks & Brooks*, for the State.

MONKS, J.—This action was brought by the State against appellants and others to have certain real estate in Lawrence county adjudged the property of the State, on the ground that the same had escheated to the State, said defendants claiming to own said real estate as the heirs of George Donaldson, deceased. The court made a special finding of facts and stated conclusions of law thereon, upon which judgment was rendered in favor of the State.

The errors assigned call in question the first and third conclusions of law. It appears from the record that in 1861 George Donaldson, then fifty years of age, a bachelor who never afterwards married, a native of Scotland and until his death on September 17, 1898, a subject of Queen Victoria, emigrated to the United States and became at once, and remained until his return to Scotland in the year 1896, a *bona fide* resident of the United States. The tracts of land in controversy were conveyed to him by deeds of warranty in the years 1865 and 1876. He became and remained a *bona fide* resident of Lawrence county, Indiana, from September, 1865, until in 1883, when he removed to the state of Alabama, of which he was a *bona fide* resident until he returned to Scotland in the year 1896, where he remained the rest of his life. He did not, at any time, declare his intention to become a citizen of the United States conformable to the acts of congress. He died intestate, leaving as his next of kin appellants, who are descendants of his brothers and sisters, all of whom were at the time of said George Donaldson's death, and ever since have been, residents of Scotland and subjects of the Queen of Great Britain and Ireland.

It was the theory of the State in the trial court, as shown by the record, that when George Donaldson returned to Scotland in 1896 he became a resident thereof, and con-

tinued to be such resident until his death in 1898. Appellants question the sufficiency of the court's finding to sustain this theory. The finding on this subject is as follows: "4. The George Donaldson mentioned in the complaint, cross-complaint, and other pleadings in this case, was born in Scotland, in the United Kingdom of Great Britain and Ireland, in the year 1811, and died on September 17, 1898, at the Maidens, Ayrshire, Scotland, in said kingdom. Said George Donaldson was, during his entire life, a subject of the monarch of said kingdom, and did not at any time declare his intention to become nor did he become a citizen of the United States conformably to the acts of congress applicable to that subject. 5. Said George Donaldson, late in the year 1860, or early in the year 1861, emigrated from Scotland to the United States, and at once became a *bona fide* resident of the United States, and so continued to be until the year 1896, when he returned to Scotland, where, soon becoming sick, he remained until his death. In the month of September, 1865, or earlier in that year, and before September 19, 1865, said George Donaldson became a *bona fide* resident of Lawrence county, in the State of Indiana, and so remained until some time in the year 1883, when he removed his residence to the state of Alabama, in the United States of America, where he was a *bona fide* resident until he so returned to Scotland, in the year 1896, whether with intent to return to the United States is not known."

The State insists that upon said fourth and fifth findings of fact, "the conclusion of law arises that George Donaldson

died a resident of Scotland, for the reasons: (1) A

1. man is presumed to be domiciled where he is found, unless he is shown to be there for some temporary purposes. (2) A stronger presumption exists that a man is domiciled where he dies. (3) On the return of an alien to his domicile of origin his original domicile instantly reverts. (4) In doubtful cases the original domicile is con-

sidered the true one." Citing, Dicey, Conflict of Laws (Am. ed.), pp. 132, 133; *The Bernon* (1798), 1 C. Rob. (Adm.) 102, 104; *Kennedy v. Ryall* (1876), 67 N. Y. 379, 386; *Ryall v. Kennedy* (1876), 40 N. Y. Super. 347, 361; *March v. Hutchinson* (1800), 2 Bos. & Pul. 226, note; *Rogers v. Mexican Schooner Amado* (1847), Newb. (Adm.) 400, Fed. Cas. No. 12,005; *Lessee of Butler v. Farnsworth* (1821), 4 Wash. C. C. 101, Fed. Cas. No. 2,240; *Elbers v. United Insurance Co.* (1819), 16 Johns. 128, 133; *Bradstreet v. Bradstreet* (1889), 18 D. C. (7 Mackey) 229; *Clough v. Kyne* (1891), 40 Ill. App. 234, 236; *Ennis v. Smith* (1852), 14 How. 399, 423, 14 L. Ed. 472; *Anderson v. Watt* (1891), 138 U. S. 694, 706, 34 L. Ed. 1078, 11 Sup. Ct. 449; *United States v. Chong Sam* (1891), 47 Fed. 878, 886; *Greenfield v. Camden* (1882), 74 Me. 56, 64; *Liscombe v. New Jersey R., etc., Co.* (1872), 6 Lans. 75, 77; *Horne v. Horne* (1848), 31 N. C. 99, 108; *Kellar v. Baird* (1871), 61 Tenn. 39, 46; *Venable v. Paulding* (1873), 19 Minn. 488, 495; *Mowry v. Latham* (1891), 17 R. I. 480, 481, 23 Atl. 13; *Guier v. O'Daniel* (1808), 1 Binn. 349, 351, 1 Am. Lead. Cas. (Hare & Wallace) *733, *734, *753; *Haskins v. Matthews* (1856), 8 DeG., M. & G. 13, 26, 35 Eng. L. & Eq. 532, 540; *Halldane v. Eckford* (1869), L. R. 8 Eq. 631, 641; *Johnstone v. Beattie* (1843), 10 Clark & F. 42, 138; Wharton, Conflict of Laws (2d ed.), §55a; 1 Wharton, Conflict of Laws (3d ed.), §551½, and cases cited; *Attorney-General v. Winans* (1901), 85 Law T. (N. S.) 508, 65 Just. P. 819; *Tracy v. Tracy* (1901), 62 N. J. Eq. 807, 48 Atl. 533; *Hairston v. Hairston* (1854), 27 Miss. 704, 61 Am. Dec. 530; *Hindman's Appeal* (1877), 85 Pa. St. 466, 468; *Anderson v. Laneville* (1854), 9 Moore P. C. 325, 334; *President, etc., v. Drummond* (1864), 33 Beav. 449, 452, 33 L. J. Eq. (N. S.) 501, 503; *King v. United States* (1892), 27 Ct. of Cl. 529, 533; *Reed's Appeal* (1872), 71 Pa. St. 378; *In re Bruce* (1832), 2 Tyr. 475,

486, 2 C. & J. 437; *King v. Foxwell* (1876), L. R. 3 Ch. Div. 518, 521; *Capdevielle v. Capdevielle* (1870), 21 Law T. (N. S.) 660, 18 Wk. Rep. 107; *White v. Brown* (1848), 1 Wall. Jr. 217, 265, Fed. Cas. No. 17,538; *Charles Green's Son v. Salas* (1887), 31 Fed. 106, 112; *First Nat. Bank v. Balcom* (1868), 35 Conn. 351, 357; *In the Matter of Wrigley* (1831), 8 Wend. 134, 140; *Sheldon v. Forsman* (1899), 17 Lanc. L. Rev. 85, 87, 14 York Leg. Reg. 102; *Marks v. Marks* (1896), 75 Fed. 321, 329; *La Virginie* (1804), 5 C. Rob. (Adm.) 98, 99; *The Ann Green* (1812), 1 Gall. 274, 286, Fed. Cas. No. 415; *Catlin v. Gladding* (1826), 4 Mason 308, Fed. Cas. No. 2,520; *Prentiss v. Barton* (1819), 1 Brock. 389, Fed. Cas. No. 11,384; *Hallett v. Bassett* (1868), 100 Mass. 167, 170; *Lord v. Colvin* (1859), 4 Drew. 366, 422; *The Venus* (1814), 8 Cranch 253, 280, 3 L. Ed. 553; *In re Walker* (1868), 1 Low. 237, 238, Fed. Cas. No. 17,061; *Burnham v. Rangeley* (1845), 1 Woodb. & M. 7, Fed. Cas. No. 2,176; *State v. Hallet* (1845), 8 Ala. 159, 161; *Miller's Estate* (1832), 3 Rawle 312, 319, 24 Am. Dec. 345; *Udny v. Udny* (1869), 2 Paterson 1677, 1683, L. R. 1 H. L. Sc. 441; *Munro v. Munro* (1840), 7 Cl. & F. 842, 876; *Colville v. Lauder* (1800), 34 Dictionary of Decisions, p. 14,964; *The Indian Chief* (1801), 3 C. Rob. (Adm.) 12, 17; *Goods of West* (1860), 6 Jur. (N. S.) 831; *Price v. Price* (1893), 156 Pa. St. 617, 27 Atl. 291. The authorities cited do not sustain the contention of appellee that said presumptions are presumptions of law, but hold that they are presumptions of fact, or, as some of them state, "*prima facie*" evidence thereof.

It is settled in this State that nothing can be added to a special finding by presumption, inference, or intendment, and that where a special finding is silent upon a

2. material point it is deemed to be found against the one who has the burden of proof. *Cleveland, etc., R. Co. v. Moneyhun* (1896), 146 Ind. 147, 153, 34 L. R.

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A. 141, and cases cited; *Craig v. Bennett* (1897), 146 Ind. 574, 575, and cases cited; *Crowder v. Riggs* (1899), 153 Ind. 158, 162; *Bradway v. Groenendyke* (1899), 153 Ind. 508, 512; *Citizens State Bank v. Julian* (1900), 153 Ind. 655, 676; *Erwin v. Central Union Tel. Co.* (1897), 148 Ind. 365, 371; *Hill v. Surihart* (1897), 148 Ind. 319, 323; *Archibald v. Long* (1896), 144 Ind. 451, 454, 455; *Brunson v. Henry* (1898), 152 Ind. 310, 314.

There is no finding that said Donaldson was at the time of his death a resident of Scotland, and under the rule in this State, as we have shown, we have no authority

3. to infer or presume as a fact, from the facts found by the trial court, that he was, even though the trial court might or should have done so. There is much argument to the effect that without such finding, under the law in force at the death of Donaldson, the conclusions

4. of law should be sustained and the judgment affirmed, but we have not considered such argument and the questions presented thereby, as this would permit the abandonment of the theory upon which the cause was tried and determined, which cannot be done under the familiar rule that the theory upon which the case was tried must be adhered to on appeal.

By express provision of the statute this court is authorized to order a new trial when the justice of the case requires it (§672 Burns 1901, §660 R. S. 1881 and

5. Horner 1901), and this power has often been exercised. *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662, 667, and cases cited; *Buchanan v. Milligan* (1886), 108 Ind. 433, and cases cited; *Stewart v. Patrick* (1892), 5 Ind. App. 50, 58, and cases cited. We think such an order should be made in this case.

Judgment reversed, with instructions to grant a new trial, with leave to amend pleadings if desired.

THE STATE v. BOOK.

187	559
169	245

[No. 20,893. Filed December 21, 1906.]

1. **INTOXICATING LIQUORS.—*Illegal Sales.—Statutes.***—The person selling, without a license, intoxicating liquors in quantities of a quart or more at a time under the act of 1875 (Acts 1875 [s. s.], p. 55), as amended by the act of 1897 (Acts 1897, p. 253), could be prosecuted only under §2186 Burns 1901, §2090 R. S. 1881, making it punishable to do business without a license, where a license is required. p. 562.
2. **SAME.—*Sales to Consumers.—Statutes.***—The purpose of the liquor license law of 1875 (Acts 1875 [s. s.], p. 55) was to regulate the sales of liquors to consumers, and not to regulate sales by wholesalers to retailers or jobbers. p. 563.
3. **STATUTES.—*Amendatory.—Subject-Matter.—Constitutional Law.***—The provisions of an amendatory statute must, to be valid, be germane to the amended statute. p. 563.
4. **CONSTITUTIONAL LAW.—*Intoxicating Liquors.—Licenses.***—The act of 1897 (Acts 1897, p. 253), amending certain sections of the act of 1875 (Acts 1875 [s. s.], p. 55), and making it unlawful to retail in quantities of less than five gallons at a time, and exempting wholesalers who sell in quantities of five gallons or more at a time, is not unconstitutional as class legislation. p. 564.
5. **STATUTES.—*Amendatory.—Effect of, on Subsequent Conduct.***—With reference to subsequent conduct, an amendatory statute must be considered as a part of the original act at the time of the original enactment. p. 564.
6. **INTOXICATING LIQUORS.—*Wholesalers.—License.—Statutes.***—The act of 1875 (Acts 1875 [s. s.], p. 55), as amended by the act of 1897 (Acts 1897, p. 253), has no application to wholesalers who sell to retailers, jobbers or consumers in quantities of five gallons or more at a time. p. 564.
7. **SAME.—*License Law of 1875.—To Whom Applicable.***—The act of 1875 (Acts 1875 [s. s.], p. 55), providing that all persons desiring to retail liquors, to be used as a beverage, in quantities of less than a quart at a time, should secure a license therefor, applied only to retailers who sold to consumers. p. 564.
8. **WORDS AND PHRASES.—*“As.”—Statutes.—Intoxicating Liquors.***—The word “as” in the phrase “engaged in business as a wholesale dealer,” as used in §7283 Burns 1901, Acts 1897, p.

253, §3, is used in the sense of "like" or as illustrating the kind of wholesalers referred to. p. 566.

9. WORDS AND PHRASES.—*"Who does not sell."*—*Intoxicating Liquors.*—*Statutes.*—The clause "who does not sell," as used in §7283 Burns 1901, Acts 1897, p. 253, §3, merely defines the character of the wholesalers who are exempt from procuring a license to sell intoxicating liquors. p. 566.
10. SAME.—*"Wholesale Dealer."*—*Intoxicating Liquors.*—*Statutes.*—*Reference to Prior Statutes.*—In determining the meaning of the words "wholesale dealer," as used in §7283 Burns 1901, Acts 1897, p. 253, §3, the court, as an aid, will look to the use of such words in the United States statutes (20 Stat., pp. 333, 334). p. 566.
11. INTOXICATING LIQUORS.—*Sales of Five Gallons.*—*Delivery of Part.*—A sale of five gallons of intoxicating liquors, a part only of which is delivered at the time, or removed from the premises, is unlawful, unless the seller has a retailer's license. p. 568.
12. SAME.—*Sales.*—*Use of, on Premises of Seller.*—Sales by an unlicensed vendor of intoxicating liquors, in any quantity, to be used on premises under the vendor's control, are unlawful as in violation of §7285 Burns 1901, §5320 R. S. 1881. p. 569.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Prosecution by the State of Indiana against Herman Bock. From a judgment for the defendant, the State appeals. *Affirmed.*

Charles W. Miller, Attorney-General, *W. C. Geake*, and *George W. Curtis*, Prosecuting Attorney, for the State.

J. M. Vandever, *S. L. Vandever*, *W. W. Woollen*, *Evans Woollen* and *Russell T. Byers*, for appellee.

JORDAN, J.—The State of Indiana, through its prosecuting attorney, commenced this action against appellee on January 3, 1906, by filing in the lower court an affidavit which, omitting the formal parts, is as follows: "That Herman Bock, on June 17, 1905, at said county and State, did then and there transact a certain business, to wit, the selling of malt liquors for the purpose of gain, and did then and there unlawfully sell five gallons of beer to Earl Reid, at and for the price of \$3, he, said Herman Bock, not then

and there having a license to sell spirituous, vinous, or malt liquors under and by virtue of the laws of Indiana, and he, said Earl Reid, not then and there being a retail dealer in such liquors.”

On motion of the defendant the court quashed this affidavit and rendered judgment, discharging the accused. The State appeals, and, under its assignment of errors, calls in question the decision of the court in quashing the affidavit. The affidavit in question is based on the following statutes: Acts 1875 [s. s.], p. 55, §1, as amended by the legislature in 1897 (Acts 1897, p. 253, §7276 Burns 1901), and §2345 Burns 1905, Acts 1905, pp. 584, 745, §661. These sections read as follows:

“7276. It shall be unlawful for any person, directly or indirectly, to sell, barter or give away, for any purpose of gain, any spirituous, vinous, or malt liquors without first procuring from the board of commissioners of the county in which such liquor is to be sold, a license as hereinafter provided; nor shall any person, without having first procured such license, sell or barter any intoxicating liquor to be drunk, or suffered to be drunk, in his house, outhouse, yard, garden, or the appurtenances thereto belonging.”

“2345. Whoever, by himself or agent, transacts any business or does any act without a license therefor, when such license is required by any law of this State, shall, on conviction, be fined not less than \$5 nor more than \$200.” Section 7276, *supra*, prior to its amendment, was section one of the liquor license law of 1875, which is entitled: “An act to regulate and license the sale of spirituous, vinous and malt and other intoxicating liquors,” etc. (Acts 1875 [s. s.], p. 55). Section one, together with sections five and seven of the latter act, was amended by the act of 1897, *supra*, and the three sections as amended now constitute §§7276, 7281, 7283 Burns 1901. Section one of the act of 1875, as originally enacted, made it unlawful “for any

person or persons to directly or indirectly sell, barter or give away for any purpose of gain, any spirituous, vinous or malt liquors, in less quantities than a quart at a time, without first procuring, from the board of commissioners of the county in which such liquor or liquors are to be sold, a license," as thereafter provided. Under the section as now amended the clause "in less quantities than a quart at a time" is omitted. Section seven of the statute of 1875 as amended reads as follows: "Upon the execution of the bond required in the fourth section of this act, being §5315 of the revised statutes of 1881, the presentation of the order of the board of commissioners, granting him license, and the county treasurer's receipt for \$100, the county auditor shall issue a license to the applicant for the sale of such liquors as he applied for, with the privilege of permitting the same to be drunk on the premises as stated in the aforesaid notice, which license shall specify the name of the applicant, the place of sale, and the period of time for which such license is granted: *Provided, that none of the provisions of this act shall apply to any person engaged in business as a wholesale dealer, who does not sell in less quantities than five gallons at a time.*" (Our italics.)

Section twelve of the act of 1875 (§7285 Burns 1901) provides the penalty which shall be inflicted against any person not licensed according to the provisions of

1. the act who sells intoxicating liquors in less quantities than a quart at a time, or who sells such liquors in any quantity to be drunk on the premises where sold. This section was not changed by the amendment of 1897. Therefore, we held in *Daniels v. State* (1898), 150 Ind. 348, that by the act of 1875 as amended no penalty was prescribed for selling without a license intoxicating liquors in a quantity of a quart or over at a time, but that the punishment for such a sale was an infliction of the penalty provided by §2186 Burns 1901, §2090 R. S. 1881. This same

section, with a slight or immaterial change, was reenacted by the legislature of 1905, and is §2345, *supra*.

Counsel for the State insist that this appeal presents a novel question. It is their contention that the person contemplated or intended by the legislature in the pro-

2. viso in section seven as amended—which declares

“that none of the provisions of this act shall apply to any person engaged in business as a wholesale dealer, who does not sell in less quantities than five gallons at a time”—was a *bona fide* wholesale dealer in all that that term implies, and was not any person who may choose to call himself a wholesale dealer and sell intoxicating liquors to consumers in lots of five gallons at a time. They assert that it was evidently the intention of the legislature in framing this statute to require every person who sold any amount of liquor to a consumer to have a license, excepting only a person engaged in business as a wholesale dealer. They contend that a person is not a wholesale dealer within the meaning of this law because he sells five gallons at a time to a consumer, but, as they insist, “he must be a *bona fide* wholesale dealer, engaged in selling to retailers, and then he, under the law, can as such wholesaler sell not less than five gallons at a time.” As hereinafter more fully shown, the purpose and object of the liquor law of 1875, as originally enacted, was to regulate and restrict the traffic in intoxicating liquors to consumers and had no application to sales made by a wholesale dealer to retailers or jobbers. As an answer to the above contention of counsel for the

State, it may be said that, if the proviso in section

3. seven as amended contemplates only sales of intoxicating liquors of the quantity specified by a wholesale dealer to a retailer and does not apply or embrace sales made by a wholesaler to consumers, then the proviso would not be germane to or within the purview of the statute amended, and therefore would be of no avail. There are no grounds to support counsel’s insistence.

Counsel for appellee, in addition to the argument to establish the insufficiency of the affidavit, assail the validity of the amendatory act of 1897, *supra*. It is insisted

4. that it is violative of §1, article 14, of the federal Constitution, and §23 of our bill of rights (Const., Art. 1, §23). Under the construction which this court accorded the amendatory act in question in *Daniels v. State, supra*, the constitutional validity thereof was, over the same objections, sustained, and, as we still adhere to that construction, it follows that the question in regard to the validity of this law may be dismissed without further consideration.

In determining the question here involved, the statute of 1875, as now amended, must be considered in regard to matters occurring thereafter as if the provisions

5. inserted therein by the amendment formed a part thereof at the time it was originally enacted. *Cain v. Allen* (1907), 168 Ind. —.

By the positive terms of the proviso in section seven, *supra*, as amended, none of the provisions of the statute is in any manner applicable to "any person engaged

6. in business as a wholesale dealer, who does not sell in less quantities than five gallons at a time." All such persons are exempt from the requirement of procuring a license to sell in such quantity.

It is manifest that under the provisions of the act of 1875, as originally enacted, the intention of the legislature was to limit the requirement of a license to those

7. persons who sold to consumers, in a less quantity than a quart at a time, intoxicating liquors to be drank as a beverage. But the provisions of our liquor license statute, as it formerly stood, have been so changed by the amendatory act in question as to make unlawful all sales of intoxicating liquors made by an unlicensed person, saving and excepting only those to whom the provisions of

the act as declared by the proviso in controversy do not apply. *Daniels v. State, supra.*

This court, in the case last cited, in considering the trend of the laws of this State regulating the traffic of intoxicating liquors, asserted that at no time did these laws apply to the traffic as between the manufacturer, the wholesale dealer, or the jobber, and the retail dealer. The court, in that appeal, further said on page 360: "All legislation has been directed to restricting and controlling sales to consumers. * * * The license features of existing laws have not even a remote application to sales by the brewer, distiller, or the wholesale dealer to the retail dealer. If they did apply, the brewer, before selling and delivering less than five gallons of beer or ale to the saloon-keeper, would be required to procure a license authorizing him to sell beer or ale by the drink for consumption upon the premises, and would be subject to all of the restrictions with reference to location of business, screens, etc., as applied to the saloon. The same would be true with reference to distillers and others who make sales to retail dealers. The scope of our laws upon the subject, we have no doubt, includes only such dealers as sell to consumers, and must be construed with reference to such class or classes. If the brewer, the distiller, the druggist, or the wholesale dealer, selling less than five gallons at a time, desires to sell to the consumer, he must procure a license just as the retail dealer, the 'quart shop' or the 'jug house' is required to do." The question necessarily arises, is there such an absence of a definition in the act in controversy in respect to what is intended by the clause "engaged in business as a wholesale dealer" that we are required to look beyond the statute and examine standard dictionaries and other authorities in order to discover in what meaning or sense the legislature employed the clause in controversy?

It will be observed that the language of the clause in question is "engaged in business *as a wholesale dealer.*"

(Our italics.) The word “as” is manifestly employed by way of example as illustrating the kind or character of the wholesale dealer referred to or intended. As disclosed by the plain language of the statute, he is not one who limits his sales to not less than ten gallons or a barrel at a time, but is one who does not sell in quantities less than five gallons at a time. By the clause

“who does not sell,” etc., the legislature evidently intended to define or point out the kind or character of a wholesale dealer who should be exempt from procuring a license to sell intoxicating liquors to a consumer. Consequently such a dealer must be regarded as a wholesale dealer and not a retailer. *Daniels v. State, supra.*

In the appeal of *Bishop v. State, ex rel.* (1898), 149 Ind. 223, 39 L. R. A. 278, 63 Am. St. 279, the question involved was in respect to the meaning or signification of the

term “deputy postmaster,” as used in §9, article 2, of the state Constitution. In order to ascertain the meaning of this term we properly resorted to an examination of the postal laws of the United States passed prior to the adoption of our Constitution. In the solution of the question much force was given to these laws in respect to the meaning in which the term in question was therein employed. In this appeal we may also properly look to acts passed by congress and in force at the time of the passage of the amendatory act in controversy, wherein wholesale and retail dealers of intoxicating liquors are defined, in order to discover the sense or meaning which the legislature intended should be given to the clause “who does not sell in less quantities than five gallons at a time.” By the provisions of section eighteen of a statute enacted by congress in February, 1875, as amended by section four of an act of March 1, 1879 (20 Stat., pp. 333, 334), a retail dealer of intoxicating liquors is required to pay a tax of \$25 and a wholesale dealer is required to pay \$100. This statute defines a retail and wholesale dealer as follows:

“Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereafter provided, in less quantities than five wine-gallons at the same time, shall be regarded as a retail dealer in liquors,” and “Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereafter provided, in quantities of not less than five wine-gallons at the same time, shall be regarded as a wholesale liquor dealer.” It is further provided that “retail dealers in malt liquors shall pay \$20. Every person who sells or offers for sale malt liquors in less quantities than five gallons at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer in malt liquors. Wholesale dealers in malt liquors shall pay \$50. Every person who sells or offers for sale malt liquors in quantities of not less than five gallons at one time, but who does not deal in spirituous liquors at wholesale, shall be regarded as a wholesale dealer in malt liquors.”

We may properly assume that the legislature, in enacting the provisions of the statute in question, in virtually the same language as that employed in the foregoing mentioned act of congress, had in mind the definition of a wholesale dealer as therein declared, and desired to bring the statute in question in harmony therewith. In reason, it may be assumed that if the legislature did not intend to make the quantity of liquor sold at a time the test for determining the character or kind of a wholesale dealer to which it referred, it would have merely declared or provided, in effect, that none of the provisions of the act should be applicable to a person engaged in business as a wholesale dealer, without emphasizing its intention by the words “who does not sell in less quantities than five gallons at a time.” This view is consistent with the interpretation accorded the statute in *Daniels v. State, supra*. The court in that case said at page 362: “As we have construed the law, every one who desires to sell to consumers must take out the license

required, unless he shall desire to sell in quantities of five gallons or more, in which event no license is required. As between those who can have a license there is no opportunity for discrimination. Whether he is a druggist, a brewer, distiller, or other manufacturer or dealer, if he sells in quantities of five gallons or more he is a wholesale dealer, and if he sells to consumers, in quantities less than five gallons at a time, he is required to take out a license." See, also, *Cahill v. State* (1905), 36 Ind. App. 507; *State v. Kiley* (1905), 36 Ind. App. 513.

Counsel for the State say that by the provisions of the amendatory act of 1897 the legislature "intended to do away with the sale of intoxicating liquors by the so-called 'quart shops'." This assertion we think may

be conceded as true, and it may be said that by the provisions of the amendatory act the legislative purpose of eliminating illegal liquor shops or places, as formerly conducted, has been successfully consummated. All that is necessary is to enforce the law as enacted. Manifestly the same facilities or opportunities which were formerly afforded for violating our liquor laws by persons selling by the quart are not afforded to the unlicensed dealer who, under the law as amended, is prohibited from selling to the consumer less than five gallons of intoxicating liquors at a time. It may properly be said that the very intent or spirit of the amendatory statute—which intent or spirit, in effect, is the same as if it were within the express letter thereof (*Conn v. Board, etc.* [1898], 151 Ind. 517)—contemplates that sales of five gallons or over at a time made by the unlicensed dealer shall be *bona fide* and that the liquors sold must be actually delivered at the time of sale and removed from the premises where sold. They cannot be permitted to remain on such premises and a part thereof removed or delivered at one time and a part at another, for, in view of the approved decisions of this court, the unlicensed seller would be liable to a prosecution for selling

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intoxicating liquors in a quantity less than five gallons at a time. *Murphy v. State* (1849), 1 Ind. *366; *Weireter v. State* (1879), 69 Ind. 269.

The sale of any quantity of intoxicating liquors by an unlicensed dealer, to be drank on the premises where sold, or on premises which are owned or used by the
12. seller, or under his control, is a violation of the law as it now stands, and subjects the offender, on conviction, to the penalties prescribed by §7285 Burns 1901, §5320 R. S. 1881. The rule asserted in *Shields v. State* (1884), 95 Ind. 299, *Stout v. State* (1884), 93 Ind. 150, and *Stockwell v. State* (1882), 85 Ind. 522, is applicable to such sales by an unlicensed dealer.

It follows from the conclusion which we have reached that the affidavit herein is fatally defective, for the reason that the quantity of liquors alleged to have been sold by appellee was not less than five gallons. The motion to quash was, therefore, properly sustained, and the judgment of the lower court is affirmed.

HAYES ET AL. v. SHIRK, EXECUTRIX.

[No. 20,802. Filed October 3, 1906. Rehearing denied December 21, 1906.]

1. ACTION.—*Contracts.*—*Decedents' Estates.*—*Executors and Administrators.*—An action to recover a personal judgment against an executor who executed, on behalf of his estate, a contract to pay certain street assessments made against his decedent's real estate, does not grow "out of any matter connected with a decedent's estate." p. 572.
2. ABATEMENT AND REVIVAL.—*Death of Party.*—*Substitution of Representatives.*—Where the circuit court has obtained jurisdiction over the parties to an action, the death of one of them does not defeat the court's jurisdiction, but the proper representative may be substituted for such decedent. p. 573.
3. APPEAL AND ERROR.—*Perfecting.*—*Time for.*—*Parties.*—*Death.*—*Substitution of Representatives.*—*Decedents' Estates.*—Where a defendant, in an action upon contract, dies after

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service, and his representative is substituted for him, an appeal taken from the judgment rendered is governed by the civil code, giving one year in which to perfect same, and not by the special provisions governing appeals growing out of matters connected with decedents' estates. p. 573.

4. **APPEAL AND ERROR.—*Precipe.***—Where a *precipe* for a transcript calls for the entries on certain pages of the order book, one of which is the final judgment, such judgment is a proper part of the transcript on appeal, though not called for in terms. p. 574.
5. **SAME. — *Transcript. — Precipe. — Presumptions.***—Where a *precipe* for a transcript calls for the entries on certain pages of the order book, and the clerk embodies the final judgment in said cause in the transcript, the presumption is that such judgment was entered upon some of such pages. p. 574.
6. **SAME.—*Transcript.—Paragraphs of Complaint.—Erroneous Marginal Notes.***—Where the transcript correctly contained the questioned paragraphs of complaint, marginal notes on the transcript denominating them “amended” paragraphs do not affect the consideration thereof, such notes being no part of the record. p. 575.
7. **SAME. — *Transcript. — Precipe.—Statutes.—Construction.***—The act of 1903 (Acts 1903, p. 338, §7, §641g Burns 1905), prescribing rules concerning civil procedure, will be liberally construed. p. 575.
8. **SAME.—*Briefs.—Whether Questioned Complaint Should be Inserted in Full.***—Only those parts of a questioned complaint which fully present the precise point at issue should be set out in the briefs on appeal, the only purpose being to present the precise question to the judges who do not have the record. p. 575.
9. **SAME.—*Briefs.—Statement of Complaint.***—Where the allegations of a questioned complaint are substantially set out in the brief, the sufficiency of such complaint will be considered. p. 576.
10. **MUNICIPAL CORPORATIONS.—*Street Assessments.—Contracts.—Waiver.***—A contract waiving irregularities in street assessments as provided by §4294 Burns 1894, Acts 1891, p. 323, §2, thus securing the privilege of paying same by instalments, creates a personal liability against the party executing same, enforceable if any part of such assessment remains unpaid after foreclosure and sale of the assessed property. p. 578.
11. **PRINCIPAL AND AGENT.—*Contracts.—Personal Liability.***—An agent, disclosing his principal and acting within the scope of

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his authority, is not personally liable on contracts executed on behalf of such principal. p. 578.

12. EXECUTORS AND ADMINISTRATORS.—*Powers.—Decedents' Estates.*—Executors and administrators derive their powers from the will of the testator or from the statutes; and they have no general or implied powers beyond those necessary to carry out those expressly conferred. p. 578.
13. SAME.—*Powers.—Personalty.*—In the absence of a testamentary provision to the contrary, an executor is entitled to all of the decedent's personal property for the purpose of a settlement of the estate. p. 578.
14. SAME.—*Powers.—Contracts Concerning Decedents' Estates.*—Executors and administrators have no power to make a new and independent contract imposing a charge upon their decedents' estates, even though such estates would be benefited thereby. p. 578.
15. SAME.—*Decedents' Estates.—Contracts.—Personal Liability.*—The general rule is that a contract executed by an executor or administrator on behalf of his decedent's estate, for its sole benefit, and intended to bind it only, is void as to such estate, and imposes a personal liability upon such executor or administrator. p. 579.
16. DESCENT AND DISTRIBUTION.—*Decedents' Estates.—Real Property.—Wills.*—Real property, on the death of its owner, descends to the heirs, and the personal representatives have no control over it, unless so provided in such owner's will. p. 580.
17. MUNICIPAL CORPORATIONS.—*Street Assessments.—Decedents' Estates.—Real Property.—Executors and Administrators.*—Street assessments made against lots belonging to a decedent's estate constitute no liability against the decedent nor his estate, and his personal representatives have nothing to do with same. p. 580.
18. CONTRACTS.—*For Benefit of Third Parties.—Consideration.—Estoppel.*—The defendant will not be permitted to assert a want of consideration in an action on a contract executed by him for the benefit of a third party and performed by the plaintiff. p. 580.
19. SAME.—*Consideration.—What is.*—A legal consideration for a contract may consist in some right, interest, profit, or benefit accruing to the promisor, or some forbearance, detriment, loss, responsibility, act, labor, or service given, suffered or undertaken by the promisee. p. 580.
20. SAME.—*Executors and Administrators.—Decedents' Estates.—Street Assessments.*—An executor is personally liable for the payment of a street assessment made against lots owned

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by his testator, where such executor, on behalf of such estate, executed the contract of waiver provided by §4294 Burns 1894, Acts 1891, p. 323, §2, thus securing the right to pay such assessment in annual instalments. p. 581.

From Fulton Circuit Court; *Harry Bernetha*, Judge.

Action by William J. Hayes and others against Ellen W. Shirk, as executrix of the will of Milton Shirk, deceased. From a judgment for defendant, plaintiffs appeal. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed*.

Kirkpatrick & Morrison, Willits & Voorhis and Isaac Conner, for appellants.

Antrim & McClintic and Holman & Stephenson, for appellee.

HADLEY, J.—Appellants instituted this action against Milton Shirk to recover a personal judgment upon contract. Before answer was filed Milton Shirk died. His death being suggested, Ellen W. Shirk, his executrix, was substituted as the sole party defendant, and filed a separate demurrer to the additional second and third paragraphs of the complaint. The demurrers were sustained, and, the plaintiffs refusing to amend, judgment was, on April 27, 1904, rendered against them for costs. On February 13, 1905, more than one hundred days, but within one year, after the rendition of said judgment, the record of this appeal was filed in the Appellate Court. No appeal bond was filed within ten days from the rendition of said judgment, and no order of the Appellate Court, or this court was made within one year after such decision granting the appeal.

Upon the foregoing facts appellee makes the point that the appeal herein should be dismissed because not taken in compliance with §2609 Burns 1901, §2454 R. S.

1. 1881, §2610 Burns 1901, Acts 1899, p. 397. This contention calls upon us to decide whether the appeal is governed by §§644, 645 Burns 1901, §§632, 633 R. S. 1881, or by the special provisions of the decedents' es-

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tates act (§§2609, 2610, *supra*), which require all appeals “growing out of any matter connected with a decedent’s estate” to be perfected within one hundred days unless otherwise ordered by the court.

This action had its origin in these facts: Milton Shirk, as executor of E. H. Shirk, held the record title to certain lots abutting on Kentucky street, in the city of Kokomo. In the improvement of this street, under the Barrett law, assessments of special benefits were lodged against the lots, and Milton Shirk, as executor of E. H. Shirk, executed a written waiver of irregularities, and promised to pay the assessments, and secured thereby, for the estate of E. H. Shirk, the right to pay the assessments in ten annual instalments. Appellants, as the owners of the defaulted bonds issued against said lots for the improvement, foreclosed and sold the lots, and, not realizing enough to pay the costs and full amount of the assessments, instituted this action on said contract of waiver against Shirk in his individual capacity, to recover the balance.

It is manifest that the decision complained of did not grow “out of any matter connected with a decedent’s estate,” but out of an alleged breach of contract with Milton Shirk.

The case was an ordinary action at law under the code. The circuit court had acquired jurisdiction of the person and subject-matter in the lifetime of Shirk, and his

2. death did not defeat that jurisdiction. Section 272

Burns 1901, §271 R. S. 1881, provides: “No action shall abate by the death or disability of a party,” but the court shall, upon motion, allow the action to proceed by or against the representative of the deceased party. Under this statute it has been held, in cases where an exec-

3. utor or an administrator has been substituted for a deceased party, that an appeal in such case will be governed by the civil code, and not by the special provisions of the act relating to the settlement of decedents’ estates.

Holland v. Holland (1892), 131 Ind. 196, 200; *May v. Hoover* (1887), 112 Ind. 455, and cases cited. This appeal having been perfected within one year after the rendition of the judgment, must be held timely.

Appellee further contends that there is nothing for decision, because the complaint upon which the only question arises, and also the final judgment, are not in the record. What purport to be the additional second and third paragraphs of the complaint—those to which the demurrers were sustained—and a final judgment are present in the record, and it is claimed that they are not properly there because not called for in the precipe nor certified by the clerk.

After properly entitling the cause the precipe directs the clerk to “prepare and properly certify for use on appeal to the Appellate Court a transcript of the following

4. papers, orders, and proceedings, filed and had in said cause: (1) The entry of said cause upon the issue docket at page 209; * * (5) the entry at page 101 of order-book 6; (6) at page 152 of same order-book, and also at page 175 of same order-book; (7) the entry at page 246 of the same order-book; (8) at page 279 of the same order-book; (9) at page 285 of the same order-book; (10) this precipe, together with the second and third paragraphs of the plaintiffs’ complaint, the demurrers thereto, the rulings thereon, and exceptions thereto.” The clerk certifies “that the above and foregoing transcript contains full, true and complete copies of the following papers, orders, and proceedings filed and had in said cause,” and appearing on the particular pages, set forth in detail, of order-book 6, as designated by the precipe.

In the transcript so certified, at the proper place, appears the copy of the final judgment, entitled, and in terms, in conformity to the previous rulings of the court. It

5. is true that the final judgment is not called for, in terms, but the entries in said cause, appearing on

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certain pages of the order-book, are, and the precipe, though informal and unskilfully drawn, was sufficient, we think, to warrant the clerk in transcribing the entry of the final judgment, if the same was found on one of the pages designated, and as the copy of the judgment is present in the record we must presume that it was so found.

It is claimed that the record discloses that amended second and third paragraphs of complaint were filed, and that the calling for the second and third paragraphs of

6. the complaint did not authorize the clerk to insert in the transcript copies of the amended paragraphs.

It is shown by the record that these pleadings were originally filed as additional second and third paragraphs of the complaint, and were then and thereafter in every step of the proceedings so denominated. There were no such papers as amended second and third paragraphs of complaint filed. In the preparation of the transcript, however, some one, in entering the marginal notes required by the rules of this court, on appropriate pages, noted in red ink, on the left margins as follows: "2d Par. Amended Complaint," "3d Par. Amended Complaint," and these memoranda furnish the only ground for the claim that amended second and third paragraphs of complaint were filed. It is hardly necessary to add that these marginal notes were no part of the record, and serve no other purpose than to point the examiner to the particular contents of the pages.

Giving to the statute concerning precipes and transcripts in appeals (§641g Burns 1905, Acts 1903, p. 338, §7) a liberal construction, as we must, there remains no

7. doubt that the precipe in question is sufficient to sustain the controverted parts of this record.

Appellee further and very earnestly contends that this appeal should not be considered, because of appellants' noncompliance with the requirements of the fifth subdivi-

8. sion of rule twenty-two in the preparation of their brief, in that they failed to set forth the contents of

their complaint. By the provision invoked, the appellants are required in their brief to give "a concise statement of so much of the record as fully presents every error and exception relied on." The first paragraph of complaint was dismissed, and the case comes up solely upon the sufficiency of the second and third paragraphs to state a cause of action (under the Barrett law) against Milton Shirk, personally, based upon his written agreement as executor of E. H. Shirk to waive all irregularities and pay the assessment in consideration of the right to pay the same in ten annual instalments. The paragraphs are alike, except that the second is silent as to whether Shirk was authorized by the will or by the court to execute said agreement, and the third expressly alleges that he was not authorized either by the will or by the court to execute it. In ruling on the demurrers, the court held that in executing the agreement as executor he did not make himself personally liable.

This ruling of the court is the only "error and exception relied on." So much of the record, then, as fully presents this question is all that is required by the rule. When the question arises upon the pleading, it is seldom necessary, under the rule, to set out the particular pleading in full, though it may be done without violating the rule. It is, however, always highly proper to omit useless matter, and it may be said that the most accurate compliance with the rule is realized when there is carried into the brief only such averments and parts as will enable the judge, not having the record before him, fully to grasp and understand the controverted point.

The two paragraphs of complaint, in this case, cover thirty printed pages of the record, the great bulk of which is of much more assistance to the court out of the

9. brief than in it. To show that the waiver sued on related to valid assessments, it is stated in the brief, in the proper place, though not under a separate heading, that each paragraph of the complaint sets up in detail all

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the various steps which were taken in the assessment of property abutting on said street, as required by the Barrett law, from the resolution declaring the necessity for the improvement to the confirmation of the assessments by the council, the amount thereof, the default in payment, the foreclosure and sale of the Shirk property, the application of the proceeds, and the inadequacy of the proceeds to pay the assessments. The written waiver and promise to pay the assessments are also made a part of each paragraph and filed therewith. It is to be conceded that there should have been more care and accuracy observed in the statement of the contents of the complaint, particularly as to the contract of waiver, but we think enough is given to effect a substantial compliance with the rule, and the sufficiency of the complaint will therefore be considered.

The suit is based upon the following instrument:

"We, the undersigned, owners of property abutting upon Kentucky street, from Bernard to Morgan streets, in Kokomo, Indiana, severally promise and agree, in consideration of having the right to pay in instalments our respective assessments for the improvement of said Kentucky street, as provided for in ordinance No. 785, that we will not make any objection to any illegality or irregularity as to our respective assessments, and will pay the same when due, with interest thereon at such rate, not exceeding six per cent, as shall by ordinance or resolution of the common council of the city of Kokomo be prescribed and required.

Milton Shirk,

Executor for E. H. Shirk.

408 ft., Lot 91, K. & S. Add. Amount \$987.36."

The real estate when assessed stood of record in the name of Milton Shirk, executor of E. H. Shirk. It so appeared upon the assessment roll. After the approval and confirmation of the assessments by the city council, within the time given by the statute, the above instrument was executed, not only by Mr. Shirk, but by divers other abutting lot owners.

It is held by the courts of this State that an agreement like the foregoing, entered into by a property owner pursuant to section seven of the act of 1889, as amended in

10. 1891 (Acts 1891, p. 323, §2, §4294 Burns 1894), to secure the right to pay an assessment in instalments, is a new and independent undertaking, upon a sufficient consideration, and imposes upon the person executing it a personal obligation to pay any part of an assessment that may remain unpaid after foreclosure and sale of the assessed property. *Wayne County Sav. Bank v. Gas City Land Co.* (1901), 156 Ind. 662; *Edward C. Jones Co. v. Perry* (1901), 26 Ind. App. 554.

It is a familiar doctrine that when an agent discloses his principal, and acts within the scope of the agency,

11. he does not render himself personally liable, unless so stipulated in the agency contract.

The powers, duties, and obligations of an executor or administrator with respect to the estate, like those of a trustee or public officer, are defined and limited by

12. will or statute. He has no general or implied powers beyond those necessary to effectuate the powers expressly conferred.

In the absence of a testamentary provision to the contrary, he is entitled, by operation of law, to the possession of the personal property of the estate. It goes to

13. him in trust for the specific purpose of adjusting and settling all contracts, claims, and obligations of the decedent that affect the assets to be administered.

He has no personal interest in the assets, and no more power than a stranger to make a new and independent contract imposing a charge upon them even for the

14. benefit of the estate. *DeCoudres v. Union Trust Co.* (1900), 25 Ind. App. 271, 81 Am. St. 95; *Cornthwaite v. First Nat. Bank* (1877), 57 Ind. 268.

In other jurisdictions independent contracts originating with, and purporting to be executed by, an executor or ad-

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ministrator, officially, for the sole benefit of the

15. estate, and intended to bind only the estate, have been held void as to the estate, and personally binding on the officer, in the following cases: Upon an acceptance: *Perry v. Cunningham* (1882), 40 Ark. 185. See, also, *Carter v. Thomas* (1851), 3 Ind. 213. Upon covenants of title inserted by him in his conveyance of real estate: *Sumner v. Williams* (1811), 8 Mass. 162, 5 Am. Dec. 83; *Osborne v. McMillan* (1857), 5 Jones (N. C.) 109. For the price of horses purchased for use in carrying on farming for and on intestate's estate: *Rich v. Sowles* (1892), 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850. For money borrowed to pay debts: *McFarlin v. Stinson* (1876), 56 Ga. 396; *Lynch v. Kirby* (1880), 65 Ga. 279; *Dunne v. Deery* (1875), 40 Iowa 251; *Christian v. Morris* (1873), 50 Ala. 585; *White v. Thompson* (1887), 79 Me. 207, 9 Atl. 118; *Winter v. Hite* (1856), 3 Iowa 142; *First Nat. Bank v. Collins* (1896), 17 Mont. 433, 43 Pac. 499, 52 Am. St. 695.

"The rule must be regarded as well settled," says Allen, J., in *Austin v. Monro* (1872), 47 N. Y. 360, "that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, * * * are the personal contracts of the executors, and do not bind the estate." "An executor or administrator * * * is bound individually, and not otherwise, by his promise to pay a debt of the decedent, though he promised to pay 'as executor or administrator,' because he has no power to bind the estate by contract." 11 Am. and Eng. Ency. Law (2d ed.), 914. See, also, 18 Cyc. Law and Proc., 247, 249; *Moody v. Shaw* (1882), 85 Ind. 88; *Holderbaugh v. Turpin* (1881), 75 Ind. 84, 39 Am. Rep. 124.

The facts alleged lead us to this feature of the case. It is alleged in the complaint that Shirk, executor, had no

authority under the will or by order of the court to
16. execute the contract sued on. The demurrer admits this averment to be true. Unlike the personalty, real property goes directly to the heir, and the personal representative has nothing whatever to do with it, or control over it, except when needed to pay debts, or it is directed by the will. So when the assessments in
17. controversy were lodged against the lots described in the complaint, the lots belonged to the heirs, and the assessments accruing after the death of E. H. Shirk were never a debt or obligation against the testator, nor his estate. Hence of no concern to his executor.

The question therefore comes to this: The contract being void as to the estate of E. H. Shirk, did it operate as the personal obligation of Milton Shirk? It is not suffi-

18. cient to relieve him from liability to show that no part of the consideration for the promise moved to him personally, or to his use. The law grants to the citizen the privilege of contracting for the benefit of third persons; and when such a contract is fulfilled by the promisee at his cost, the promisor will not be heard to say that no consideration moved to him. What constitutes a valuable and sufficient consideration for a promise is thus stated

19. in 6 Am. and Eng. Ency. Law (2d ed.), 678: "It may be said to consist either in some right, interest, profit, or benefit accruing to the party who makes the promise, or some forbearance, detriment, loss, responsibility, act, labor, or service given, suffered, or undertaken by the other to whom it is made." See, also, a large number of cases collated in support of the text. "It is a familiar doctrine," says Woods, J., in *Shaffer v. Ryan* (1882), 84 Ind. 140, "that the consideration of a promise need not be a benefit to the promisor, but may consist of a benefit to a third person, or of a detriment to the purchaser."

The street was improved, and the appellants purchased the bonds on the faith of the promise made by Milton

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Shirk to pay the assessments, and under the rule of 20. law, as shown by the foregoing authorities, his estate must be held liable.

Judgment reversed and cause remanded, with instructions to overrule the demurrer to the second and third paragraphs of complaint.

CONCURRING OPINION.

MONTGOMERY, J.—It is required by §4294 Burns 1901, Acts 1899, p. 63, as a condition precedent to the issuance of street improvement bonds and the right to pay the same in instalments, that the owner of the lot or tract of ground subject to the lien shall promise and agree in writing not to make any objection on account of any illegality or irregularity in the assessment, and to pay the same personally. The issuance of bonds without this written waiver by the owner of the real estate affected would be unauthorized; and the extension of the time of payment of the assessment lien is secured, not by a mere agreement of parties, but by virtue of a right granted by statute. The execution of such waiver and personal obligation by any one other than the owner would not satisfy the requirements of the statute, or authorize the issuance of improvement bonds, or estop the holder of the lien from collecting the assessment at any time. If the holder of the lien cannot be bound by a waiver executed by a volunteer, then there could be no consideration for the personal agreement of such volunteer promisor. These facts take this case out of the class in which an administrator or executor may bind himself personally upon an independent contract. With this explanation, and upon the understanding that the complaint proceeds upon the theory that Milton Shirk was the owner, or one of the owners, of the real estate assessed for the improvement, at the time he executed the instrument sued on, I concur in the result reached in the opinion of my brother Hadley.

MILLET v. CITY OF PRINCETON.

[No. 20,766. Filed January 8, 1907.]

1. MUNICIPAL CORPORATIONS.—*Sidewalks.—Riding Bicycles on.—Criminal Law.*—Riding a bicycle on a city sidewalk composed of stone, brick, plank or gravel is, by §4398 Burns 1901, §3361 R. S. 1881, a misdemeanor. p. 584.
2. SAME.—*Ordinances.—State Laws.—Which Govern.*—An act punishable by a state law cannot be made punishable by a city ordinance. p. 584.
3. PLEADING. — *Complaint. — Negligence. — Riding Bicycle on Sidewalk.—Ordinances.—Presumptions.*—An allegation that a bicycle rider was riding on a sidewalk pursuant to an ordinance means that he was riding agreeably to such ordinance, and consequently that, in fact, he knew the provisions thereof. p. 584.
4. MAXIMS.—*Ignorance of Law.—Action.*—The maxim "*ignorantia juris non excusat*" is perverted by an assumption that all persons know the law. p. 585.
5. MUNICIPAL CORPORATIONS.—*Ordinances.—Sidewalks.—Riding Bicycles on.—Knowledge of Law.*—Where a bicycle rider knew it was a violation of the State law to ride a bicycle on a certain sidewalk in a city, an ordinance granting him the right to ride on such sidewalk did not even give him a colorable right so to ride. p. 585.
6. SAME.—*Ordinances.—General Language.—Restraints on.*—A city ordinance permitting bicycle riding generally on its sidewalks will be held to apply only to those sidewalks upon which it is authorized by the State laws to permit bicycle riding. p. 585.
7. SAME.—*Ordinances.—Prohibiting Bicycle Riding on Certain Sidewalks.*—Where a city ordinance prohibits bicycle riding on the sidewalks of a certain territory, the presumption is that such territory contained sidewalks of the kind that the city might lawfully exercise jurisdiction over. p. 585.
8. SAME.—*Enforcement of Laws.—Liability for Failure.—Sidewalks.—Bicycles.*—A city is not liable for its failure to enforce the laws, or for an *intra vires* act done in its legislative capacity; and is therefore not liable to a pedestrian struck by a bicycle rider who is unlawfully using its sidewalk. p. 586.

Millet v. City of Princeton—167 Ind. 582.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Action by Edwin P. Millett against the City of Princeton. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Cullop & Shaw and *Fields & Harmon*, for appellant.

John W. Brady, for appellee.

GILLET, J.—Appellant appeals from a judgment which followed the sustaining of a demurrer for want of facts to his complaint. The action was to recover damages for personal injuries alleged to have been sustained by appellant by being run over by a bicycle wrongfully ridden by another along a sidewalk on one of the streets of said city. Appellee is sought to be charged on the theory that by ordinance it wrongfully licensed the riding of bicycles along its sidewalks. Two ordinances are pleaded. The first was passed in 1896. Section three thereof provides that it shall be unlawful for any person to ride a bicycle on any sidewalk of any street within the corporate limits of said city at a greater rate of speed than six miles an hour, while section four makes provision concerning the conduct of persons riding bicycles upon any sidewalk of said city when overtaking or passing a pedestrian. The other ordinance, which was passed in 1897, prohibits the riding of a bicycle along any sidewalk within certain prescribed limits of said city. It is charged that appellant was injured, while walking along a sidewalk on West Emerson street in said city, by a bicycle rider, who was negligently riding along said sidewalk at a dangerous and rapid rate of speed, to wit, twenty miles per hour, and that said bicycle rider was riding along said sidewalk pursuant to the authority of the ordinance of 1896. It is also alleged that at the time of the passage of said ordinance, and ever since that time, there were and are in the streets of said town many sidewalks constructed of stone, brick, plank, or gravel, and many sidewalks constructed of other materials, but that the sidewalk on which

appellant was injured was constructed of stone and brick, and that it was without the limits of the territory described by the ordinance of 1897. It is further charged that from and after the passage of said ordinances it has been the practice of bicycle riders generally to ride upon the sidewalks of said city without said territory at a rapid and dangerous rate of speed, and to such an extent as to make the sidewalks dangerous to pedestrians and the practice a common nuisance, but that the city, knowing said facts, has continued said ordinances in force, and has treated them in all respects as legal and binding.

Riding along a stone, brick, plank, or gravel sidewalk on a city street is a misdemeanor. §4398 Burns 1901, §3361

R. S. 1881; *City of Indianapolis v. Higgins*

1. (1895), 141 Ind. 1; *Town of Whiting v. Doob* (1899), 152 Ind. 157. Section 1709 Burns 1901, §1640 R. S. 1881, provides: "Whenever any act is made a public offense against the State by any statute and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated
2. city or town; and any ordinance to such effect shall be null and void." Under the section of statute first referred to, the jurisdiction of cities to regulate the riding of bicycles along sidewalks is limited to sidewalks constructed of materials other than stone, brick, plank, and gravel. *Town of Whiting v. Doob, supra*.

The complaint before us suggests the possibility that upon inquiry a number of structural weaknesses might be found therein, but we shall express an opinion upon only one or two of the suggested questions.

The charge that the bicycle rider whose negligence caused appellant's injury was riding on the sidewalk pursuant to the ordinance of 1896 means no more—since the

3. presumption is against the pleader—than that he was doing so agreeably to the provisions of said ordinance. The so-called license, then, it must be pre-

sumed, is built upon an assumption that the bicycle rider did in fact know the law, and that it should therefore be intended that he was acting under said ordinance. While there is no doubt that he could not avoid a legal lia-

4. bility by the plea that he was ignorant of the law, yet the assumption for all purposes that he did in fact know it is a perversion of the maxim, "*Ignorantia juris non excusat.*" *Daily v. Board, etc.* (1905), 165 Ind.

99. But, if we were to assume that constructively he knew of the ordinance, it would also follow, by the same token, that he was chargeable with a knowledge of the laws

5. of the State, under which it was incompetent for the municipality to license him to ride along any stone, brick, plank, or gravel sidewalk. In this view it would have to be said that appellee's ordinances did not afford said bicycle rider even a colorable excuse for violating the laws of the State.

The ruling of the court below may, however, be upheld, so far as the facts averred are concerned, on the theory that, as a matter of interpretation, it must be said that

6. the ordinance of 1896 did not attempt to license riding along sidewalks composed of the materials mentioned in §4398, *supra*. It is a maxim of the law that general words are to be restrained according to the nature of the thing (Bacon, Max. Reg., 10; Wharton, Legal Maxims, 207), and, to the extent that said ordinance impliedly licensed riding along sidewalks, it should be assumed that it was intended to apply to walks over which the council had jurisdiction, that is, to walks made of other materials than stone, brick, plank, and gravel, many of which, according to the averments of the complaint, were composed of such other materials.

The contention that the ordinance of 1897, prohibiting all bicycle riding within designated limits, shows

7. by implication that it was the intent in enacting the ordinance of 1896 to authorize riding on side-

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walks made of stone, brick, plank, or gravel, is a most remote one—one that can scarcely be said to be sufficiently strong to make the city a tortfeasor as against the general presumption in favor of right action. But it is enough to say concerning the ordinance of 1897 that it does not appear what kinds of sidewalks were within the territory to which it related, but it may be presumed that such sidewalks were of such a character that the common council might lawfully legislate concerning them. So far as concerns the remaining allegations of the complaint,

8. as to the practice of bicycle riders, it is enough to say that the city is not liable for a failure to enforce the laws, or for an *intra vires* act done in its legislative capacity. *Faulkner v. City of Aurora* (1882), 85 Ind. 130, 44 Am. Rep. 1; *City of LaFayette v. Timberlake* (1882), 88 Ind. 330; *Aiken v. City of Columbus* (1906), *ante*, 139. The complaint is clearly insufficient, and the court did not err in sustaining a demurrer to it.

Judgment affirmed.

DIGAN, ADMINISTRATOR, v. MANDEL.

[No. 20,848. Filed January 8, 1907.]

1. PLEADING.—*Complaint.*—*Bills and Notes.*—*Ownership.*—Where the plaintiff is not the payee of a note, he must set out in his complaint thereon, facts showing that he holds the title thereto. p. 590.
2. SAME.—*Complaint.*—*Bills and Notes.*—*Mistake in Name of Payee.*—A complaint showing that the maker of a note, through mistake and inadvertence, inserted in the note as payee the name of a bank instead of the plaintiff, to whom the note was executed, sufficiently shows plaintiff's title to such note. p. 590.
3. BILLS AND NOTES.—*Insertion of Wrong Person as Payee.*—*Indorsement.*—Where, by mistake, the name of a bank was inserted as the payee of a note intended to be executed to plaintiff, such bank never acquired any interest in such note. p. 590.

4. **BILLS AND NOTES.—Mistaken Payee.—Indorsement.—Parties.**—The indorsement of a note by the nominal payee, whose name was inserted by mistake, to the real payee does not constitute such nominal payee an assignor within §277 Burns 1901, §276 R. S. 1881, and, even in the absence of an indorsement, such nominal payee is not a necessary party to an action by the real payee to enforce such note. p. 591.
5. **TRIAL.—Theory.—Pleading.—Evidence.—Variance.**—A plaintiff must recover, if at all, by proof of the allegations of his complaint. p. 591.
6. **SAME.—Theory.—Bills and Notes.—Title.—Allegations.—Evidence.—Variance.**—Title to a note must be proved as laid in the complaint or the result will be a fatal variance. p. 591.
7. **BILLS AND NOTES.—Delivery.—Signatures.**—Delivery of a note is a material element in the execution thereof, and when the execution of a note is denied, proof of such delivery as well as the signing thereof is necessary. p. 592.
8. **SAME.—Delivery.—What Constitutes.**—Delivery of a note is shown, where such acts are proved as show an unmistakable intention, on the part of the maker, to relinquish all power and control over it and give it effect in the hands of the payee. p. 592.
9. **EVIDENCE.—Bills and Notes.—Introduction of.—Preliminary Proof Necessary.**—Proof of the possession of a note by the plaintiff and of the defendant's signature thereto, authorizes the admission of such note in evidence, the order of proof being immaterial. p. 593.
10. **TRIAL.—Burden of Proof.—Bills and Notes.—Alterations.**—The burden of proving material, unsuspicious alterations in a note, subsequent to its execution, is upon defendant. p. 593.
11. **PLEADING.—Decedents' Estates.—Bills and Notes.—Execution.—Assignments.—Burden of Proof.**—Under §2479 Burns 1901, Acts 1883, p. 151, §11, an answer of *non est factum* is not necessary, on behalf of an executor or administrator, to require the owner of a note executed by decedent, to establish the execution thereof, a general denial compelling such owner to make such proof. p. 594.
12. **PARTIES.—Real.—Nominal.—Bills and Notes.—Pleading.**—The real payee of a note may maintain an action on a note executed by mistake in the name of another by showing that he was the intended payee. p. 594.
13. **BILLS AND NOTES.—Delivery.—Evidence.—Possession.—Presumptions.**—Possession of a note signed by decedent and nominally payable to a third party, by whom it was indorsed to

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plaintiff, such third party disclaiming title thereto at any time, does not sustain an inference or presumption of delivery of such note, where the execution of such note is denied. *Taylor v. Gay*, 6 Blackf. 150, disapproved. p. 595.

14. **BILLS AND NOTES.**—*Mistake.*—*Evidence.*—Where plaintiff alleged that, by mistake, a third party was named as the payee of a note intended to be executed to plaintiff, proof of such third party's indorsement of such note to plaintiff and that such third party never had title thereto, does not sustain a finding that such maker inserted, by mistake, such payee's name instead of plaintiff's. p. 597.

From Cass Circuit Court; *John S. Lairy*, Judge.

Action by Joseph Mandel against James F. Digan, as administrator of the estate of James O'Donnell, deceased. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

McConnell, Jenkines, Jenkines & Stuart, for appellant.
Lairy & Mahoney, for appellee.

MONTGOMERY, C. J.—Appellee brought this action upon a promissory note against Max Jennings and James O'Donnell. No service was obtained upon Jennings, and no appearance by him entered. O'Donnell answered (1) general denial, (2) *non est factum*, (3) payment, (4) want of consideration, and (5) that the note was signed by O'Donnell as surety, and at the time was intentionally made payable at the City National Bank of Logansport, with the understanding between him and Jennings that appellee's assignor, John F. Troutman, should also sign the note as cosurety; that the note was never delivered to the payee therein named, nor any consideration given for its execution; that the note came into the hands of Troutman long after the time fixed for its maturity, and without the knowledge or consent of O'Donnell, and by means unknown to him. The affirmative answers were denied. O'Donnell died, and appellant, as his administrator, was substituted as defendant, and thereupon filed answers (1) denial, (2)

non est factum, and (3) want of consideration. Appellee replied to the third paragraph of answer in denial. A trial by the court resulted in a finding and judgment in favor of appellee for the full amount of principal and interest evidenced by the note, together with attorneys' fees and costs.

The controlling question for our consideration is presented by the assignment that the court erred in overruling appellant's motion for a new trial. The complaint alleges in substance the following facts:

On September 17, 1899, Max Jennings was indebted to John F. Troutman in the sum of \$251.34, and to evidence and secure the same Jennings as principal and O'Donnell as surety executed to Troutman the following promissory note:

"Logansport, Indiana, September 17, 1899.

Ninety days after date, we, or either of us, promise to pay to the order of the City National Bank of Logansport, at the City National Bank of Logansport, Indiana, \$251.34, with interest at the rate of eight per cent per annum from date, and attorneys' fees. The makers and indorsers jointly and severally waive presentment for payment, protest, notice of protest, and nonpayment of this note. Max Jennings,
James O'Donnell."

By mistake and inadvertence in drafting, said note was made payable to the City National Bank of Logansport, Indiana, and upon discovery of such mistake, about March 17, 1901, the bank assigned the note to Troutman by the following indorsement thereon: "Pay to the order of John F. Troutman, without any recourse on us. City National Bank." Troutman indorsed the note to appellee, and the same is due and unpaid. The signature of O'Donnell to the note was shown to be genuine, and the execution of the indorsements by the City National Bank and John F. Troutman was proved. The note was read in evidence. John Gray testified that he was president of the City Na-

tional Bank, and prior to the bringing of this action, and perhaps three years after the date of the note, he made the indorsement in the name of the bank. The note was then in the possession of Troutman, and before he examined it or made the indorsement his attention was called to the fact that it was by its terms made payable to the bank. After making the indorsement he handed the note back to Troutman and could not recall that he had seen the note at any other time, either before or since. The bank never paid any consideration to any one for the note, and it was never delivered to or the property of the bank, and was only in the hands of the witness for the purpose of writing the indorsement made at the request of Troutman. The amount recoverable as attorneys' fees was agreed upon, and this was substantially all the evidence given in the case.

Appellant insists that all the material and necessary allegations of the complaint are not proved, and that the decision of the court is not sustained by the evidence.

The note upon its face is not payable to the appellee, but is payable to the order of a third party, and, in an action upon such an instrument, it is incumbent upon the

1. plaintiff to allege facts in the complaint showing his title or right to maintain the action. *Carskaddon v. Pine* (1900), 154 Ind. 410; *Keller v. Williams* (1875), 49 Ind. 504; *Nelson v. Johnson* (1862), 18 Ind. 329; *Stowe v. Weir* (1860), 15 Ind. 341; *Barcus v. Evans* (1860), 14 Ind. 381; *Montague v. Reineger* (1861), 11 Iowa 503.

This requirement is met with the averment that, by mistake and inadvertence in drafting, the note was made payable to the bank, instead of Troutman, the payee

2. intended, and by Troutman was indorsed to appellee. Under these averments the City National Bank never acquired any interest in the note, and was not an assignor within the meaning of that term as used
3. in §277 Burns 1901, §276 R. S. 1881, and, even in the absence of the indorsement by it shown in

the complaint, would not have been a necessary party to the action. *Smith v. Walker* (1893), 7 Ind. App.

4. 614; *Rhyan v. Dunnigan* (1881), 76 Ind. 178, 180; *Meeker v. Shanks* (1887), 112 Ind. 207, 211.

The indorsement by the bank passed no right or title in or to the paper not already vested in the holder. The manifest theory of the complaint is that Troutman, through whom appellee derived title, was the real payee intended at the time the note was executed; that he did not acquire his title by indorsement or delivery, but that the note was executed to him directly, and that another name, not a mere trade name of his, but the name of a third party, was written therein as payee by mistake and inadvertence. It

is a general rule of pleading that a plaintiff must
5. succeed, if at all, upon the case made by his complaint, and his evidence must prove his case upon the theory pleaded in the complaint or he will fail. *Terre Haute, etc., R. Co. v. McCorkle* (1895), 140 Ind. 613; *Holderman v. Miller* (1885), 102 Ind. 356; *Leeds v. City of Richmond* (1885), 102 Ind. 372.

The rule more particularly stated and applied is to the effect that, when an action is brought upon a note or other chose in action, the specific title alleged

6. must be proved as laid, the same as if the action were brought for the recovery of real estate. *Indianapolis, etc., R. Co. v. Center Tp.* (1895), 143 Ind. 63, 70; *Smelser v. Wayne, etc., Turnpike Co.* (1882), 82 Ind. 417; *Morgan v. Smith, etc., Organ Co.* (1880), 73 Ind. 179; *Wallace v. Reed* (1880), 70 Ind. 263; *Jackson Tp. v. Barnes* (1876), 55 Ind. 136; *Smith v. Walker, supra.*

The contested question for decision is whether there is any evidence to sustain the allegation that the instrument in suit was executed by the makers to John F. Troutman, and, by mistake and inadvertence in drafting, his name was omitted and another inserted as payee. Appellee's counsel contend that proof of the genuineness of O'Donnell's signa-

ture, together with possession of the paper by Troutman two or three years after its date, and a denial by the City National Bank, the nominal payee, that the note was never executed to it, warrants and sustains the finding in his favor.

The delivery of an instrument is a material element in its execution, and when execution is denied a delivery of the writing must be proved, as well as the signatures

7. of the parties disputing its validity. In the case of *Purviance v. Jones* (1889), 120 Ind. 162, 16 Am. St. 319, Judge Mitchell, speaking of the delivery of a note, very aptly said: "To constitute a delivery it must appear that the maker, in some way, evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use." Appellee relies upon the following cases to justify the inference of delivery from the facts proved: *Brooks v. Allen* (1878), 62 Ind. 401; *Taylor v. Gay* (1842), 6 Blackf. 150; *Stayner v. Joyce* (1889), 120 Ind. 99; *Green v. Beckner* (1891), 3 Ind. App. 39; *Garri-gus v. Home, etc., Soc.* (1891), 3 Ind. App. 91, 50 Am. St. 262; *Talbott v. Hedge* (1892), 5 Ind. App. 555; *Meeker v. Shanks, supra*.

The case of *Taylor v. Gay, supra*, so far as it declares that contracts such as a promissory note are established by their production by the plaintiff and proof of the signature of the defendant or of his handwriting, and that the ceremony of delivery does not attach to this kind of contract, is not in exact accord with the later holdings of this court. In the case of *Purviance v. Jones, supra*, speaking to this point, Judge Mitchell said: "The acts which consummate the delivery of a promissory note are not essentially

8. different from those required to complete the execution of a deed. Act and intention are the two elements essential to the delivery of a deed, which is ordi-

narily effected by the simple manual transfer of possession from the grantor to the grantee with the intention of passing the title and relinquishing all power and control over the instrument itself. The final test is, did the maker do such acts in reference to the deed, or other instrument, as evidence an unmistakable intention to give it effect and operation, according to its terms, and to relinquish all power and control over it in favor of the grantee or obligee." See, also, *Palmer v. Poor* (1889), 121 Ind. 135, 139, 6 L. R. A. 469, and cases cited.

The cases of *Stayner v. Joyce*, *supra*, *Talbott v. Hedge*, *supra*, and *Green v. Beckner*, *supra*, merely hold that possession by the plaintiff and proof of defendant's

9. signature authorize the introduction of the note in evidence. This holding is unquestionably correct, as was said also in the case of *Kusler v. Crofoot* (1881), 78 Ind. 597. The order of proof is not material, and the introduction of the note may be followed by proof of its delivery. The case of *Meeker v. Shanks*, *supra*, while somewhat similar in facts, is but remotely in point as an authority upon the question in controversy in this case. The plaintiff in that case declared upon a title derived through an indorser, and no question of the sufficiency of the evidence was involved.

In the case of *Brooks v. Allen*, *supra*, the real dispute was not as to the genuineness of the signature or the delivery of the note, but concerning an alleged alteration

10. made after the signing and delivery of the paper, and the court correctly held that the burden of showing such alteration under the issues was upon the defendant, and, in the absence of any indication of the alleged alteration on the face of the note, or other evidence of the fact, the plaintiff would be entitled to recover. In that case, and also in the case of *Garrigus v. Home, etc., Soc.*, *supra*, the declaration of law, that possession of a note will raise a presumption of delivery, was made with reference

to notes in the possession of the payee therein named. We are not required to pass upon that question in this case.

The plea of *non est factum* was filed by appellant, but, under the provisions of §2479 Burns 1901, Acts 1883, p. 151, §11, no such answer was necessary to

11. impose upon appellee the burden of proving the execution of the instrument sued upon, and of the assignments of the same. *Riser v. Snoddy* (1856), 7 Ind. 442, 65 Am. Dec. 740; *Mahon v. Sawyer* (1862), 18 Ind. 73; *Barnett v. Cabinet Makers Union* (1867), 28 Ind. 254; *Cawoods v. Lee* (1869), 32 Ind. 44; *Estate of Wells v. Wells* (1880), 71 Ind. 509.

We have already shown that the averments in the complaint, that appellee's assignor, Troutman, was the payee intended, and that a mistake occurred in drafting

12. the note by which another name was inserted as such payee, were material and necessary to show appellee's true title. Construing the complaint as we do, this case comes within the rule announced in *Leaphardt v. Sloan* (1840), 5 Blackf. 278, declared in the following words: "If a promise be made to a person by a wrong name the promisee may sue upon that promise in his right name, and aver himself to be the person intended. And a plaintiff suing upon a promissory note, which purports to be payable to a person of a different name, may show by evidence that he was the person intended." In the case of *McKinney v. Harter* (1845), 7 Blackf. 385, Judge Blackford, in discussing a similar question, said: "The allegation amounts to an averment, that the defendant made the due bill to the plaintiff by the name mentioned in it. The instrument offered in evidence agreed with the description in the declaration, and was admissible. The plaintiff, however, could not recover without other evidence besides the due bill. It was necessary for him to prove that, by the words in the due bill 'the estate of Thomas Eager, deceased,' the plaintiff was the party intended. But he had

a right to introduce the due bill, previously to offering any other evidence." See, also, *Rhyan v. Dunnigan* (1881), 76 Ind. 178.

Appellee relies wholly upon the inference to be drawn from possession of the paper by Troutman to establish the requisite delivery. As pertinent to this feature of

13. the case we quote from the well-considered case of *Sears v. Daly* (1903), 43 Ore. 346, 73 Pac. 5: "In an action upon a promissory note, where its execution is denied by the defendant, there is no presumption that it has been regularly executed. In such case the plaintiff must establish the fact that it is the note of the defendant, and on this proposition he has the burden of proof throughout. * * * In case an instrument in form a promissory note is shown or admitted to have been executed, certain presumptions will attach to it in the hands of the holder, such as that it was made for a valuable consideration, regularly indorsed for value before maturity, is truly dated and the like; * * * and, in an action thereon between the immediate parties, the onus is upon the defendant to establish any affirmative defense. * * * But, where the making of the note is the point in issue, no presumption can attach until its execution is shown. A promissory note is a promise in writing to pay to a person therein named a certain sum of money at a specified time. Until the fact of the signing and delivery by the defendant, or by his authority, is established, there is no promissory note, and nothing to which a presumption can attach." We quote with approval from the opinion in the case of *Chenot v. Lefevre* (1846), 8 Ill. 637, 641, as peculiarly applicable to this case, the following language: "The defendant requested the court to give two instructions * * * as follows: If the jury believe from the evidence, that the notes offered in evidence are payable to a person of a different name from that of the plaintiff, and that there was no testimony before them showing that the plaintiff was the person

intended, they must find for the defendant. This instruction the court refused to give. In this the court erred. Where a note is given to a person by a name other than his real name, he may aver in the declaration that the note was given to him by the name as specified in the note; but then it is necessary to prove to the satisfaction of the jury, that he was the person intended as payee. That is an allegation that requires to be established by the proof as much as any other material allegation in the declaration, and is not established by the mere fact that the plaintiff has possession of the note. It is probable that where the initial of the given name is only given in the note, that the bare possession of the note would be sufficient to entitle him to recover, where there was no suspicion otherwise in the case; but where the name is another than that of the plaintiff, extraneous evidence of the identity must be produced." In the case of *Stowe v. Weir* (1860), 15 Ind. 341, this court said: "A party cannot be permitted to rely upon a mere possession to establish title to a promissory note, while his pleadings aver a transfer in writing." In the case of *Smith v. Walker* (1893), 7 Ind. App. 614, the complaint averred that the note in suit was executed to the appellee Walker, but by mistake and inadvertence the name of C. C. Smith was written therein as payee, and the court said: "It was incumbent on appellee to prove on the trial the facts alleged in the complaint. If he had failed to establish the alleged mistake, as charged (or, perhaps, if it had appeared that Smith ever, at any time, had any interest in the note), there would have been a fatal variance between the pleading and the proof."

We have referred to and quoted from various decisions of this court relating to the subject under consideration, for the purpose of exhibiting the process by which our conclusion was reached. The possession of the paper by Troutman shown, payable as it was to the City National Bank, conceding the signature of appellant's decedent to be genu-

ine, affords no basis for the inference that the note was fully executed by delivery. Appellee relies upon the general principle that possession is *prima facie* evidence of title, to establish the delivery. The general doctrine as applied to contentions over the title to existing articles of property is well established. If the dispute here concerned only the title to the paper irrespective of the writing upon it, the possession of Troutman and his assignee might give color of title and create a presumption of ownership. Delivery involves both an act and an intention, and where the contest is waged with respect to the act and purpose necessary to create the article, and give it existence and legal force, there can be no presumption of law or foundation for an inference of fact in favor of one not in terms a party to the disputed instrument. It was incumbent on appellee to prove delivery, or to prove such facts as warranted the inference of delivery by the trial court. In this respect there is a failure of evidence.

Appellee was required, under the issues, to prove also that the name of the City National Bank was inserted in the paper by mistake, and that Troutman was the

14. payee intended by the makers. The indorsement

by the bank and the testimony of its president as given had no tendency to prove such fact. It was clearly shown that the bank knew nothing as to the intention of the parties at the time of signing the paper, and at no time had any interest in the alleged note, and so could not and did not attempt to confer any right with regard to it upon Troutman. The only relevant presumption of law attaching to a writing fully executed is that it contains and correctly expresses the intention of the parties to the same. This presumption may be rebutted by an allegation and proof of a mistake. If, then, any inference upon the subject of intent could be drawn from this writing, in the absence of extrinsic evidence, it would be that the signers intentionally inserted the name of the City National Bank

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as payee, and that there was no mistake in drafting the instrument. In our opinion the evidence fails, in the respects indicated, to support the decision of the trial court, and a new trial must be awarded.

The judgment is reversed, with directions to sustain appellant's motion for a new trial, and for further proceedings.

INDIANAPOLIS TRACTION & TERMINAL COMPANY
v. KLENTSCHY.

[No. 20,867. Filed January 9, 1907.]

1. **TRIAL.—Verdict.—General.—Import of.**—A general verdict for plaintiff is a finding that the material allegations of the complaint are true. p. 600.
2. **APPEAL AND ERROR.—Weighing Evidence.**—The Supreme Court can disturb a judgment on the ground of insufficiency of the evidence, only where there is a total failure of the evidence to support some material point of the case. p. 600.
3. **STREET RAILROADS.—Carriers.—Gratuitous Carriage.—Invitation.**—Where an officer of a street railroad company, on behalf of such company, invited a visiting order, composed of women of whom plaintiff was one, to take a free trolley ride on one of such company's cars, the acceptance of such invitation by taking passage on the car constituted the plaintiff a passenger. p. 600.
4. **SAME. — Carriers.—Gratuitous Carriage.—Negligence.—Liability.**—Carriers are liable to passengers for negligence resulting in damage, though the carriage is gratuitous. p. 601.
5. **CARRIERS. — Gratuitous Carriage.—Negligence.—Contracts.**—Carriers may contract against liability for negligence in the gratuitous carriage of passengers. p. 601.

From Hamilton Circuit Court; *Samuel R. Artman*, Special Judge.

Action by Mary Klentschy against the Indianapolis Traction & Terminal Company. From a judgment on a verdict for plaintiff for \$1,000, defendant appeals.

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Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

F. Winter, William S. Christian and W. H. Latta, for appellant.

Doan & Orbison and Neal & Beals, for appellee.

MONKS, J.—Appellee brought this action to recover damages for personal injuries alleged to have been caused by the negligence of appellant while she was a passenger upon one of its cars. A trial of said cause resulted in a verdict, and, over a motion for a new trial, a judgment in favor of appellee.

The errors assigned and not waived call in question the action of the court in overruling appellant's motion for a new trial. The causes assigned for a new trial and urged in this court as grounds for reversal of the judgment are: "(1) The verdict of the jury is not sustained by sufficient evidence; (2) the verdict of the jury is contrary to law; (3) the court erred in refusing to instruct the jury to return a verdict for the defendant."

It is alleged in the complaint, in substance, that appellant is a common carrier of passengers for hire, and operates and controls a line of street railroad in the city of Indianapolis; that on May 14, 1903, appellee was invited with other ladies to take passage on one of defendant's cars, which ran in and along Central avenue; that she was given passage upon said car because she was a member of the National Council of Royal Neighbors of America, which was then visiting the city of Indianapolis; that she took passage upon a car owned, controlled, and operated by appellant, and was riding as a gratuitous passenger on said car; that while so riding, appellant carelessly, negligently, and without warning ran said car upon which appellee was riding into the rear end of another car of appellant upon the same line, thereby throwing appellee backward against the rear end of said car and on the floor, thereby inflicting deep, lasting, severe, and permanent injuries upon her

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person, etc.; that said injuries were caused solely by the negligence of appellant as aforesaid in causing said cars to collide.

Appellant insists that under the evidence in this case the relation of carrier and passenger did not exist between appellant and appellee at the time she was injured,

1. and that appellant did not owe her any duty at said time, and the motormen and conductors whose negligence caused the injury of appellee were at the time servants of the Royal Neighbors, and that appellant was not responsible for their negligence. The general verdict for appellee necessarily found that appellant had the control of said cars, conductors, and motormen, and ran and operated said cars through its said servants, and that said society of Royal Neighbors did not control said servants or manage or operate said cars, and that appellee was a gratuitous passenger on one of said cars and was injured by the negligence of the employes of appellant as alleged in the complaint.

It is settled that this court will not disturb the verdict of a jury merely on the weight of the evidence. It is only when there is no evidence on one or more material

2. points that this court can interfere on the ground of the insufficiency of the evidence. *Cleveland, etc., R. Co. v. Stewart* (1903), 161 Ind. 242, 244-246; *McCarty v. State* (1891), 127 Ind. 223, and cases cited.

It appeared from the evidence that on May 14, 1903, the order of Royal Neighbors, composed of women, was holding a national convention in the city of Indianapolis,

3. appellee being in attendance. A committee of said society solicited a donation from appellant, and were informed by one of its officers that it could not make a donation, but would give a free trolley ride to the members of said society attending the convention and furnish them street cars for that purpose. The committee caused an invitation to be given to the delegates, and a large

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number of them, including appellee, availed themselves of the invitation and boarded the cars for a ride through the city. During the progress of the ride a collision occurred between two of the cars, by reason of which appellee was injured. The three cars were in charge of the regular conductors and motormen of appellant, and appellant run and operated said cars through said employees.

The invitation was authorized by the appellant's officer and was the invitation of appellant, and, when appellee, one of the persons so invited, took passage on one of said cars, she was a passenger, and the relation of carrier and passenger existed between appellant and appellee.

A passenger who is carried gratuitously by a common carrier is as much a passenger as if he were paying full fare, and the mere fact that he is carried gratu-

4. itously will not of itself deprive him of his right of action if injured by the negligence of the carrier.

Russel v. Pittsburgh, etc., R. Co. (1901), 157 Ind. 305, 312, 313, 55 L. R. A. 253, 87 Am. St. 214, and cases cited; 2 Hutchinson, Carriers (3d ed.), §§1021, 1022; 5 Am. and Eng. Ency. Law (2d ed.), 507, 508; 6 Cyc. Law and Proc., 544.

True, when a passenger who is carried gratuitously—that is, as a favor, and without any compensation or advantage to the carrier—the carrier may lawfully

5. contract with him that he will take upon himself all risk of personal injury from the negligence of the agents and servants of the carrier for which the carrier would otherwise be liable. 6 Cyc. Law and Proc., 579; 2 Hutchinson, Carriers (3d ed.), §1075; *Payne v. Terre Haute, etc., R. Co.* (1902), 157 Ind. 616, 56 L. R. A. 472, and cases cited.

There is no claim in this case that appellee entered into any such contract with appellant, or that she was carried by appellant subject to any such condition or stipulation. A judgment in favor of a member of the Royal Neighbors

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for injury received in the same collision was sustained by the United States Circuit Court of Appeals, in *Indianapolis Traction, etc., Co. v. Lawson* (1906), 143 Fed. 834.

Judgment affirmed.

WHITESELL ET AL. v. STRICKLER ET AL.

[No. 20,937. Filed October 9, 1906. Rehearing denied January 9, 1907.]

1. **APPEAL AND ERROR.—Exceptions.—When Several.**—An entry showing that the “court overrules the separate demurrer by each of the defendants to the amended complaint, * * * to which ruling of the court the defendants except,” which entry was made pursuant to a ruling upon a demurrer in form: the defendants “each separately and severally demurs to plaintiff’s complaint,” etc., shows a several and not a joint exception by the defendants. *Noonan v. Bell*, 159 Ind. 329, and *Southern Ind. R. Co. v. Harrell*, 161 Ind. 689, overruled. p. 606.
2. **PLEADING.—Demurrers.—Joinder of Parties in.**—Parties may join in a single demurrer, whether the demurrer be joint or several. p. 607.
3. **SAME.—Demurrers.—Exceptions.—How Construed.**—Exceptions, apparently joint, will be construed in connection with the pleadings or motions upon which they are based, and if such pleadings or motions are several, such exceptions will be considered several. p. 608.
4. **APPEAL AND ERROR.—Purpose.—Assignment of Errors.**—The purpose of an appeal is to present to the appellate court for review the precise questions ruled on by the trial court, the assignment of errors being the complaint on appeal. p. 608.
5. **SAME.—Exceptions.—Assignment of Errors.**—Several assignments of errors on appeal present no questions where founded on a joint exception; and joint assignments present no questions where founded on several exceptions. p. 609.
6. **SAME.—Trial Procedure.—Construction.**—Strict construction of the rules of procedure is ordinarily applied to determine the questions ruled upon by the trial court, but where two or more parties join in the same pleadings a liberal construction prevails to determine the rights of the parties therein. p. 609.

167	602
167	253
167	254
168	45
168	673

167	602
170	143
170	277
170	278

7. PLEADING.—*Exceptions.—Presumptions.*—The presumption is that exceptions taken by a party on the trial were intended to be effectual in presenting the same questions on appeal. p. 609.
8. DESCENT AND DISTRIBUTION.—*Decedents' Estates.—Widows.—Liberal Policy towards.*—The policy of the law of this State is to deal liberally with the widow in the distribution of the husband's estate. p. 610.
9. WILLS.—*Widow's Election.—Decedents' Estates.*—A widow has the right, free from any misrepresentation, concealment, suppression of facts, or appeals to duty, to make her election whether to take under her husband's will. p. 610.
10. SAME.—*Widow's Election.—Time for.*—Under §2666 Burns 1901, Acts 1885, p. 239, a widow has one year from the admission of her husband's will to probate, to elect whether she will take thereunder. p. 610.
11. SAME.—*Widow's Election.—Duty of Courts Concerning.*—Courts will carefully scrutinize all outside influences brought to bear on a widow in order to induce her to make her election whether she will abide by, or reject, the provisions for her in the will of her husband; and if such influences were harmful, the courts will protect the widow. p. 611.
12. SAME.—*Widow's Election.—Fiduciaries.—Burden of Proof.*—In a suit by a widow against the heirs at law of her deceased husband to set aside her election not to take under her husband's will, the burden rests upon such heirs to prove that such election was fair and equitable, and free from undue influence. p. 612.
13. PLEADING.—*Complaint.—Wills.—Widow's Election.—Setting Aside.—Fraud.*—A complaint showing that the plaintiff was a widow; that her husband had given her by his will all of his property; that her daughter and daughter's husband, who was a practicing attorney, invited her to their house, where they, together with the circuit judge whom such son-in-law had invited to be present, induced her to elect to renounce the provisions of her husband's will on the ground that he had not the mental capacity sufficient to execute same, states a cause of action for setting aside such election. p. 612.
14. WILLS.—*Widow's Election.—Setting Aside.—Fraud of Third Party.*—That the fraud, which induced a widow's election to renounce the provisions of her husband's will, was that of a third party who received no benefits therefrom, is no defense to a suit to set aside such election. p. 614.
15. JUDGMENT.—*Res Judicata.—What Questions are.*—A judgment is *res judicata* as to all matters litigated, or which, under the issues formed, might have been litigated. p. 615.

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16. JUDGMENT.—*Res Judicata*.—*Parties to the Issue*.—Rights of defendants as among themselves are not determined in an action wherein no cross pleadings are filed, a determination of such questions as to the plaintiff being insufficient to adjudicate their rights as to each other. p. 616.
17. SAME.—*Res Judicata*.—*Parties*.—*Issues*.—To be *res judicata*, a former judgment must have been between the same parties and upon the same issues. p. 616.
18. SAME.—*Res Judicata*.—*Wills*.—*Widow's Election*.—*Setting Aside*.—*Decedents' Estates*.—*Sales to Pay Debts*.—A judgment in a suit by an administrator, against the widow and other heirs, to sell his decedent's real estate to pay debts, is not *res judicata* in a subsequent suit by such widow to set aside her election to renounce the provisions of her husband's will, where no issues were formed between her and the other heirs in such former suit. p. 616.
19. SAME.—*Res Judicata*.—*Partition*.—*Wills*.—*Widow's Election*.—*Setting Aside*.—A judgment in a suit for partition brought by the widow and three other heirs against a fourth heir of decedent, wherein no issues were formed as among the plaintiffs, is not *res judicata* as to a subsequent suit by plaintiff to set aside her election to renounce the provisions of her husband's will. p. 617.
20. ESTOPPEL.—*In Pais*.—*Taking Advantage of One's Own Wrong*.—Where defendant wrongfully and fraudulently secured the plaintiff to renounce the provisions of her husband's will, defendant's purchase of the devised property at administrator's sale and expenditure of money thereon to the knowledge of plaintiff, and plaintiff's conveyance to defendant of her one-third interest in such lands in consideration of care and support, do not estop plaintiff from setting aside her election to renounce the provisions of the will and assert title to the proceeds of the property in the hands of the administrator. p. 617.
21. WILLS.—*Widow's Election*.—*Failure to Make*.—Failure by a widow to file her election to accept or renounce the provisions of her husband's will, within one year from the probate thereof, constitutes an election to take under such will. p. 618.
22. SAME.—*Widow's Election*.—*Rescission*.—*Limitation of Actions*.—A widow's rescission of an election to take under her husband's will, in the absence of fraud, must be made within one year from the probate of such will. p. 618.
23. SAME.—*Widow's Election*.—*Rescission*.—*Limitation of Actions*.—A suit by a widow to rescind her fraudulently procured election to take under the law instead of her husband's will, may

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be maintained at any time within the six-year statute of limitations. p. 619.

24. **WILLS.**—*Widow's Election.*—*Fraud.*—*Laches.*—Where defendant by fraud secured her aged mother to renounce the provisions of her husband's will, a suit brought before the final settlement of his estate, and within a reasonable time after the discovery of the fraud by such mother, shows a sufficient excuse for such delay. p. 619.
25. **ACTION.**—*Causes of.*—*Concealment.*—*Fraud.*—Acts constituting a fraudulent concealment of a cause of action may precede, be concurrent with, or subsequent to, the accruing of such cause. p. 620.
26. **SAME.**—*Special Judges.*—*Change of Venue.*—*Motion to Remand.*—*Waiver.*—Where a special judge in a cause was appointed in the county where the suit was brought, and defendant, on a change of venue from such county, closed the issues in such case, he thereby waived his right to object to the person or to the regularity of the appointment of such special judge, and a motion to remand to such county should be overruled. p. 620.
27. **COSTS.**—*Action.*—*Parties.*—*Statutes.*—*Wills.*—*Widow's Election.*—*Rescission.*—Under §603 Burns 1901, §594 R. S. 1881, the trial court has the right to tax the costs of a suit to rescind a widow's election to renounce the provisions of her husband's will, against the particular defendants who fraudulently secured her to make such election. p. 621.
28. **SAME.**—*Separate Issues.*—If defendants make separate issues in a suit, the trial court has the right to apportion the costs according to the costs made on such issues. p. 621.

From Hancock Circuit Court; *Daniel L. Wilson*, Special Judge.

Suit by Elizabeth Strickler against Elmira J. Whitesell and others. From a decree for plaintiff, defendants, except one, appeal. Transferred from Appellate Court under subd. 2, §1337j Burns 1901, Acts 1901, p. 565, §10. *Affirmed.*

Samuel C. Whitesell, Downing & Hough, A. C. Lindemuth and Robbins & Starr, for appellants.

B. F. Mason and Thomas J. Study, for appellee Elizabeth Strickler.

HADLEY, J.—Amos Strickler died testate in Wayne county, Indiana, October 23, 1899. He executed his will on March 10, 1889. On November 6, 1899, the will was proved, admitted to probate, and duly recorded. By the terms of his will, after providing for the payment of all his debts, he bequeathed to his widow, appellee Elizabeth Strickler, all of his estate both real and personal. The value of the estate thus bequeathed was about \$10,000. Besides his widow, he left, as his only heirs, the defendants, Elmira J. Whitesell, his daughter, Minos Strickler, his son, and Russell Strickler, his grandson. After the probate of the will, the widow elected to renounce the will and take under the statute. Appellant Henry C. Starr was thereupon appointed administrator of the estate, gave bond, and proceeded to the settlement of his trust, and has converted all of the estate, both real and personal, into cash, and has the proceeds thereof, less expenses, etc., in his possession. The widow, who was the plaintiff below, brought this suit to set aside her election to take under the statute, to the end that she might take under the will. She bases her right to maintain the suit upon the false and fraudulent representations made by the appellees Elmira J. Whitesell and her husband, Samuel C. Whitesell, and the judge of the Wayne Circuit Court. The prayer of the complaint is that appellee's said election to reject the will and take under the statute be canceled and set aside, and that the administrator of the estate be ordered and directed to pay to her all of the money in his hands after the payment of debts and costs of administration.

All of the heirs of the decedent, the administrator of the estate, and the husband of Elmira J. were made parties defendant, and appeared to the suit, and all de-

1. murred to the complaint. The demurrer to the complaint, omitting the formal parts thereof and the names of the demurring parties, is in the following words: "Each separately and severally demurs to the plaintiff's

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complaint, and for cause of demurrer says that said amended complaint does not state facts sufficient to constitute a cause of action." The record shows that the "court overrules the separate demurrer by each of the defendants to the amended complaint, * * * to which ruling of the court the defendants object and except." All of the defendants below, except Minos O. Strickler, filed answers. A demurrer was addressed to each affirmative paragraph and each of said demurrers was sustained. All of the defendants who appeared to the suit thereupon withdrew their respective answers of general denial and elected to stand upon the affirmative answers. The defendant Minos O. Strickler, who is made an appellee here, was duly defaulted. There was then a finding and judgment for the plaintiff, setting aside her election to take under the law.

(1) It is earnestly contended by counsel for appellee that under the exceptions reserved to the rulings on the demurrers to the complaint, and the several assignments of error thereon, no question upon the demurrers is presented for decision, because the record discloses separate assignments of error based upon joint exceptions. The assignments on the ruling upon the demurrers to the complaint, as made, are separate and not joint. It will be noticed from the above quotation from the record that the exception reserved was, as termed, "by the defendants." From the nature of the proceedings up to this point, we think it is misleading and improper to construe the plural pronoun employed by the clerk in recording the minute, as characterizing the act of the defendants as being joint.

When two or more parties desire to demur separately to the same pleading, on the same ground, the law does not require each to file a separate paper. If they choose,

2. all may act separately in demurring, and yet unite in the same paper, provided it is clearly stated therein that they act severally and not jointly.

The demurrer under consideration, after setting forth the names of all the defendants as demurring parties, proceeds, "each separately and severally demurs

3. * * * and for cause of demurrer says," etc.

Not only do they employ the distributive word "each" and the singular verbs "demurs" and "says," but the association of these with the words "separately" and "severally" make it too plain for argument that the paper was intended to be, and in fact was, the several demurrer of each of the defendants. It was so understood by the court, for the record goes on, "and thereupon the court overrules the separate demurrer by each of the defendants to the complaint, to which ruling of the court the defendants except." What ruling is here referred to as reserved? Certainly no other than that described immediately preceding. It could have been no other, because the record shows there was no other ruling on demurrer to the complaint. That ruling, though a separate act, and in a sense in gross, is as clearly distributive in effect as if the court had repeated and announced separately the ruling against each of the six demurrants; and, the defendants all being severally, though in the same way, affected by the ruling, we see no reason why they might not unite in reserving several and appropriate exceptions. *Stamets v. Mitchener* (1906), 165 Ind. 672. Furthermore, under these facts, we think the words "defendants except" mean the same as if the clerk had written, "each of the defendants excepts," which, without any question, should be construed distributively.

An appeal is allowed by the statute solely for the correction of errors of the trial court. The assignment of error is termed the complaint in this court, and must be

4. consistent, and correctly and specifically present to the court, in manner and form as presented to the lower court, the particular rulings and subject-matter

thereof, as shown by the record to have been made and excepted to.

As a joint complaint in the trial court must be good as to all who join or good as to none, so a joint assignment to be sufficient must be founded upon a ruling

5. against all, and which must be erroneous as to all, or it will be held so as to none. *Orton v. Tilden* (1887), 110 Ind. 131, and cases cited. Likewise a separate assignment, founded upon a joint ruling against one or more appellants, presents no question to this court. *Green v. Heston* (1900), 154 Ind. 127, and cases cited. It is the same questions that were ruled upon by the trial court, presented here in the same way, that are reviewable on appeal.

In identifying the question appealed, it is plain that the rules of procedure should be strictly construed, in fairness to the trial court, if for no better reason, but, as in

6. this case, when two or more persons desire to take the same step, but to act separately, and for convenience unite in presenting one paper, and the court by a single action rules against all, the exceptions to the ruling as recorded by the clerk should be liberally construed with a view of according an appropriate exception to each exceptor. And such exception should be allowed unless clearly incompatible with the record.

When an appellant excepts to a ruling for the purpose of presenting it to a court of review, it should at least be presumed that his exception was intended to be in the

7. capacity and relation that would make it effective.

The assignments of error predicated upon the ruling on the demurrers to the complaint are several, and we think the same are supported by proper exceptions reserved at the trial. Our holdings on exceptions reserved to rulings on demurrer to the complaint in *Noonan v. Bell* (1902), 159 Ind. 329, and *Southern Ind. R. Co. v. Harrell* (1904), 161 Ind. 689, 63 L. R. A. 460, while perhaps the logical

result of prior rulings, if pressed to an extreme, appear to us, on further consideration, as too restricted, and the same are now disapproved.

(2) Was the complaint sufficient? It counts upon fraud and undue influence of the defendants Whitesell and Whitesell and the judge of the Wayne Circuit Court, whereby the plaintiff was induced to renounce the provisions made for her by the will of her deceased husband, and in lieu thereof accept her portion of her husband's estate under the law.

It was held in *Garn v. Garn* (1893), 135 Ind. 687, that the policy of the law of this State has ever been to deal liberally with widows in the distribution of their

8. husbands' estates. In harmony with this doctrine the statute guarantees to a widow the right of election between the provisions of her husband's will and those provided by the statute, and the right to make the same understandingly. No misrepresentation, no concealment or suppression of the facts, no appeal to family duty or

9. obligation, will be allowed by the court to thwart her free will, and prevent her from arriving at an intelligent decision. As was said in the case of *Garn v. Garn*, *supra*: "Nothing less than an act intelligently done will be sufficient. She should know, and if she does not, she should be informed, of the relative values of the properties between which she is empowered to choose; in other words, her election must be made with a full knowledge of the facts. The rule applies with special force where the widow is called upon, as in this case, to make her election shortly after her husband's death."

The law recognizes the tender relation of husband and wife, and the usual liberality of a husband when he undertakes by will to make provision for the future com-

10. fort and support of the wife. Responding to this sentiment, the statute now in force—§2666 Burns 1901, Acts 1885, p. 239—is so constructed that a widow will be held to have chosen under the will, unless within

one year from probate she shall file with the clerk her solemn declaration of election to take under the law. In other words, if a widow is passive and takes no action at all with respect to her election, she will conclusively be presumed to be content with the will.

It is a well-known fact that a wife who has attained to old age before the death of the husband, and who has given her life to domestic duties, and had little or no ex-

11. perience in business affairs, or in ascertaining the current values of property, when suddenly bereaved and called upon to choose between two portions of the family estate, is, in most instances, as helpless as a minor, and feels wholly incapable of acting upon her own judgment in matters of importance. In such emergencies the natural and usual resort is to those possessed of her confidence, and whom she believes to be competent and interested in her welfare. In situations like this, and in all cases where the relations in life are such that influence is acquired by one and confidence reposed by another, so as to give rise to opportunity for imposition or undue influence, such as arise between guardian and ward, parent and child, husband and wife, principal and agent, and the like, and where one of the parties, by reason of his surroundings, is unable to treat with the other upon terms of equality, courts of equity will carefully scrutinize the dealings between them and compel restoration in the absence of absolute fairness. In such cases, says Judge Story, the one subject to undue influence "has no free will, but stands *in vinculis*. And the constant rule in equity is, that where a party is not a free agent and is not equal to protecting himself, the court will protect him." 1 Story, Equity (13th ed.), §239. And this rule in equity is not confined to formal relations, such as those alluded to, but extends to every case where confidence exists on one hand and influence on the other, "from whatever cause they may spring." *M'Cormick v. Malin* (1841), 5 Blackf. 509, 522; *Burden v. Burden* (1895), 141 Ind. 471, 476; *Culley*

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v. Jones (1905), 164 Ind. 168; *Wheeler v. Smith* (1850), 9 How. 55, 82, 13 L. Ed. 44; Bispham, Prin. of Eq. (7th ed.), §232; Kerr, Fraud and Mistake (2d ed.), 166.

The rule we have been considering does not deny the power of the parties to contract, nor denounce all dealings between them as fraudulent, but in every such case

12. it rests upon the superior, or party who has taken the benefit, to prove that the transaction was in every respect fair and equitable, and the free consent of him subject to the undue influence. See above authorities. *Holt v. Agnew* (1880), 67 Ala. 360, 368; Browne, Parol Ev., §38.

These principles embrace the substance of the complaint. It is set forth that the plaintiff is an old woman, ignorant of the law, of value, of business, and lacking the

13. degree of mental capacity necessary to make a will; that Elmira J. Whitesell is her daughter; that Samuel C. Whitesell is Elmira's husband, a skilful lawyer, and a practicing attorney in Wayne county; that by the provisions of the will the whole estate of Amos Strickler was bequeathed to the plaintiff; that her husband requested her to accept the provisions of the will, and she desired and intended to do so; that within a few days after the death of her husband and the probate of the will, to wit, within twelve days after the probate, Samuel C. and Elmira Whitesell—to enable Elmira to inherit a large portion of her father's estate—repeatedly represented to the plaintiff that the will of Amos Strickler was invalid and void for unsoundness of mind of the testator, and could be set aside, and further represented to her that the judge of the Wayne Circuit Court, a special friend and associate of Samuel C. Whitesell, desired to see and talk with her concerning her deceased husband's estate; that, relying upon said representation, she went to the city of Richmond and to the house of Elmira J. and Samuel C. Whitesell, and after night on the day of her arrival Samuel C. Whitesell brought said

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judge to his house, and Samuel C. and his wife and the judge discussed with the plaintiff the mental condition of her husband when he made his will, and declared and asserted that he was incapable of making a will, that his will was invalid, and that she might better take her portion under the law; that she believed and relied upon what they claimed and asserted concerning her deceased husband, and was induced thereby to execute, and on the following day, to wit, November 18, 1899, did execute, and file with the clerk, her election to renounce the will and take under the law. It is difficult to conceive of an influence more potential than that exercised against the plaintiff as here alleged: Mr. Whitesell, the son-in-law, a practicing lawyer of the county, and reasonably supposed to know, or at least she had the right to presume he knew, whether, under the law and facts stated, the will was valid; his wife, her daughter, who should naturally feel the most unselfish desire for the plaintiff's future comfort and support, and when there is added the counsel and advice of the resident circuit judge, the influence brought to bear against the widow seems practically irresistible. If the will was invalid it could convey no rights, and all might be lost, and, in her lonely, inexperienced, uninformed, hesitating condition, the advice of the judge alone would hardly fail to control her action for good or ill, and for one as readily as the other. Even if there was no personal acquaintance—which is not probable in this case—it was reasonable for her to suppose, from the honorable and responsible position occupied, that the judge was a man of legal learning, and of the highest integrity. She also had the right to regard him as the final arbiter of all questions relating to the settlement of her husband's estate, and in determining the validity of her husband's will in any suit or contest that might be brought. Also the right to assume, from the request for the interview with her, that he felt an interest in her welfare, and would advise her to

that course which was best for her to take from the perplexing situation.

It is absurd to say that the widow was on equal terms with her advisers, or in position, as against their contrary advice, to form an independent and intelligent judgment. What the judge said to her and his advice to take under the law, under the circumstances alleged, was calculated to secure acceptance and obedience as promptly as would his judgment announced from the bench; and, resulting in detriment to the widow and in benefit to the appellants, no evidence that we can conceive of can be brought to relieve the transaction of fraud. But it should be borne in mind that what is here said concerning the judge is based upon averments of the complaint, and not upon facts proved, or even testified to. It is, too, but just to the eminent jurist referred to, to state that he is a judge of long experience, and of irreproachable character, and has had no opportunity of meeting the charge. We therefore indulge no adverse presumption in relation thereto, except such as the law requires in testing the sufficiency of the complaint.

Because the judge derived no benefits from the plaintiff's election to take under the law, makes no difference. The transaction is not purged of its fraud by showing

14. that it was brought about by a third person. A delivery of the fruits to a stranger does not purify an evil deed. "I should regret," says Lord Eldon, in *Huguenin v. Baseley* (1807), 14 Ves. 273, 289, "that any doubt could be entertained, whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others." It is not by whom, but the manner of getting, which constitutes the question. *Ranken v. Patton* (1877), 65 Mo. 378, 415. It follows that we hold the complaint sufficient, and the demurrers thereto properly overruled.

(3) The defendant Minos O. Strickler made default. The administrator filed a separate answer in two paragraphs—former adjudication, and the statute of the limitations of one year. Elmira J. and Samuel C. Whitesell filed a joint and separate answer in two affirmative paragraphs. The second, former adjudication. The third, estoppel. Elmira J. answered separately in two paragraphs, former recovery and estoppel, respectively. Russell Strickler, by his guardian, answered in two paragraphs, of former adjudication. The administrator's third paragraph and the joint answer of the Whitesells and Russell Strickler set up that the cause of action had not accrued to the plaintiff within one year from the probating of the will. To each of these answers a demurrer was sustained. The Whitesells in their second, Russell Strickler in his first, and the administrator in his second paragraph, set up the same facts as *res adjudicata*. In substance they alleged that the plaintiff elected to take under the law, and the administrator thereupon filed his petition to sell the undivided two-thirds of the real estate to pay the debts of the estate. The plaintiff was made a party and filed an answer to the effect that she was the owner of an undivided one-third of the lands and that she was not paid \$340 of her statutory allowance as widow, which she requested should be declared a lien on the property sold. Further proceedings are alleged that resulted in an order and sale of the undivided two-thirds of the home farm to the defendant Elmira J. Whitesell for \$3,610 and the balance of the land for \$2,150 to a third person.

The facts pleaded in the answers last above described fall far short of being sufficient as answers of former adjudication. The general rule is that the judgment

15. in the former action settles all matters of controversy involved in the issues between the parties to the action; that is, all matters litigated, or which might

have been litigated within the issues as they were made, or tendered by the pleadings in the case, but not matters which might have been litigated under such issues formed by additional pleading. *Finley v. Cathcart* (1898), 149 Ind. 470, 63 Am. St. 292; *Duncan v. Holcomb* (1866), 26 Ind. 378. "The party who invokes the doctrine of former adjudication must be one who tendered to the other an issue to which the latter could have demurred or pleaded." *Jones v. Vert* (1889), 121 Ind. 140, 16 Am. St. 379.

In an action against A and B on a note, A made default, and B answered suretyship, which was decided against him. This judgment did not operate as *res adjudicata* in a subsequent action brought by B against A alleging the same facts. *Harvey v. Osborn* (1877),

55 Ind. 535. Stated more generally, where two or more defendants make issues with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been, but was not, put in issue by a proper pleading. *Finley v. Cathcart*, *supra*.

"An answer of a former recovery must make it appear that there is an identity between the present and the previous cause of action, and that the parties in the

17. present action are the same as in the previous one."

State, ex rel., v. Page (1878), 63 Ind. 209, 212.

See, also, *Jones v. Vert*, *supra*.

In the former case in his petition to sell the undivided two-thirds of the land to pay debts—which petition was filed within three months after the probating of the

18. will—the administrator tendered to the defendants, the widow and heirs an issue to show cause, if any they had, why said land should not be sold to pay the debts of the testator. The petition alleged that the plaintiff had elected to take under the law, and she had, and so she admitted in her answer, she at that time resting innocently

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under the alleged fraud perpetrated upon her by her co-defendants. At the time of filing her answer, the plaintiff had the absolute right to rescind her election, the statutory period not having expired, but, if she had chosen to seek its annulment on the ground of the alleged fraud, she would have been required to implead her codefendants. This she did not do. There was no impleading of any kind between her and her codefendants. Her codefendants in the former suit are the defendants in this, except the administrator, who is here a nominal party. The subject-matter of this suit is entirely different from that of the former suit and there are perhaps other reasons why, under the authorities, the answers under consideration are not good.

The second paragraph of the answer of Russell Strickler counts upon a judgment of partition rendered in a suit brought by the plaintiffs Elizabeth Strickler, Minos

19. O. Strickler, and Elmira J. Whitesell against said Russell Strickler for the division of some property in Centerville, belonging to the estate of Amos Strickler, deceased, in the petition for which Elizabeth admitted she was the owner of one-third and the other parties the owners of the balance. There was no interpleading, and the facts set up are insufficient as a former recovery for the same reasons given above.

After Elmira J. Whitesell had purchased at the administrator's sale the undivided two-thirds of the home farm, she and the plaintiff, within the statutory period

20. for election, entered into a contract whereby the plaintiff agreed to, and did convey to Elmira her undivided one-third of the home farm for the expressed consideration that Elmira should furnish her mother a home on the farm and maintain her as long as she lived. Upon the faith of said conveyance Elmira expended \$2,000 for repairs and betterment of the farm. The Whitesells jointly and Elmira separately rely upon these facts, and a

vast amount of irrelevant and evidentiary matter provable under the general denial, to estop the plaintiff from now claiming the fund in the hands of the administrator. It should be borne in mind that the plaintiff is not seeking to disturb a judgment, or anyone's title to the property conveyed by the administrator or herself, but only seeks to be restored to her rights in the proceeds of the property remaining in the possession of the administrator after the payment of debts and expenses of administration. No rights of innocent third persons contravene, and no part of the controversy can affect anyone but the parties to the original fraud charged. Refraining from analysis and extended argument, we deem it sufficient to say that equity will not permit a wrongdoer, while retaining the fruits of his wrong, to interpose an act, intentionally and wrongfully induced by him, as an estoppel against the injured party in an action for redress. One seeking equity must be able to show that he himself has clean hands. The demurrers to the answers in estoppel were rightly sustained. We are also of the opinion that the limitation pleaded by the administrator and the other defendants as above noted, in bar of the complaint, is inapplicable and insufficient.

As we have seen, if a widow is content with the provision made for her by the will, it is not important under §2666 Burns 1901, Acts 1885, p. 239, that she make and

21. file with the clerk her formal election. Her silence and inaction will be held evidence of an acceptance of the will, and, if continued for more than one year from the probate, will be held as conclusive evidence of acceptance.

Under the statute it is clear that if she desires to change or rescind her choice, formed in favor of the will,

22. to that of the law, she must do so within the statutory period. *Garn v. Garn* (1893), 135 Ind. 687.

That is, if the testamentary provision is to be annulled in favor of the statutory provision, it must be done within

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one year from the date of probate, but if she seeks

23. to rescind her election to take under the law and again place herself under the will after the expiration of the year, for fraud, as in this case, she may bring her action within the general statutory period. There is no statute of limitations governing this suit other than the six-year statute, and she is only required, as in other cases in equity, to excuse any apparent delay. With this in view she alleges in the complaint that, at the time Elmira J. and

Samuel C. Whitesell and the circuit judge induced

24. her to take the statutory portion in lieu of the testamentary provision, they requested and urged upon her not to tell anyone of the meeting, or of what had been said to her by the judge, or other party in his presence, concerning her husband's want of testamentary capacity, or the invalidity of his will, as the judge had no right to advise her in relation to such matters, and, believing that such representations were true and made in good faith, and relying on them, she was induced thereby to tell no one anything that was said to her concerning her husband's mental condition and the invalidity of his will, or of the meeting, or of what occurred therein, until a few weeks—the exact time she cannot state—prior to the commencement of this suit, when, becoming suspicious that said representations concerning her husband and his will might not be true, she took legal advice, and for the first time learned and discovered that said statements were false, and that her husband did have testamentary capacity when he executed his will, and that said will was valid, and that said false statements and advice were but a fraudulent scheme to induce her to reject the provisions made for her by her husband in his will. These facts we think fully excuse the delay, and show that she brought the action within a reasonable time after the discovery of the fraud. The complaint makes it plain that it was undue influence on the one side and undue confidence on the other that

led the plaintiff to surrender the whole for a part of her husband's estate; and the same influence that induced her to make the election was well calculated to lull her into silent resignation, and prevent inquiry and investigation.

There is nothing in the point that a cause of action cannot be concealed before it exists. It is well settled that

acts constituting fraudulent concealment may pre-

25. cede, be concurrent with, or subsequent to, the accruing of the cause of action. It is only important that such acts are of a character, and designed to operate after the cause of action shall arise, to prevent its discovery. *Jackson v. Jackson* (1898), 149 Ind. 238, 245.

(4) This cause originated in the Wayne Circuit Court. The regular presiding judge of which court is the same person referred to in the complaint as having

26. joined the Whitesells in advising the plaintiff. The venue of the cause was changed from the Wayne Circuit Court to the Henry Circuit Court and from the latter to the Hancock Circuit Court. The proceedings in the Wayne Circuit Court as disclosed by the certified transcript to the Henry Circuit Court were signed by "John M. Smith, special judge." In the Hancock Circuit Court the defendant Russell Strickler, after appearing and demurring to the complaint, excepting to the ruling, and filing his answers to the merits, moved to strike the cause from that docket, and remand the same to the Wayne Circuit Court, because it did not appear that the Wayne Circuit judge was in any way disqualified, or that Smith was appointed special judge. This defendant at that time made no objection to the special judge sitting in the case, or to the regularity of his appointment, and all such objections will now be deemed waived. "A practice that would permit a party litigant to proceed for months before a *de facto* judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then if not satisfied with some of his rulings, or not disposed

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to go into trial, when the cause is ready for trial, to be able, in a moment, to arrest proceedings, and oust the jurisdiction of the judge, cannot be tolerated." *Lillie v. Trentman* (1890), 130 Ind. 16, 20. There was no error in overruling the motion to remand.

The court gave the plaintiff judgment for costs against the defendants Elmira J. and Samuel C. Whitesell, to which they reserved an exception. Section 603

27. Burns 1901, §594 R. S. 1881, provides that when there are several defendants the costs shall be apportioned according to the judgment rendered upon the issue. The only issue tendered by the complaint was the alleged fraud of Elmira J. and Samuel C. Whitesell. No fraud or wrongdoing was charged against any other defendant. The administrator was but a nominal party. He was only the custodian of the fund the others were lawing over. Minos O. Strickler made no defense. Russell Strickler's defense rested wholly upon the Whitesells' defense. The plaintiff was successful. In such a case the judgment of the court apportioning the cost will be presumed correct. *Miller v. Dill* (1898), 149 Ind. 326.

It is further held under said section that if one of several defendants makes a separate issue, which shall be declared against him, he is liable for the costs.

28. *Reynolds v. Bond* (1882), 83 Ind. 36, 43; *Boyd v. Jackson* (1882), 82 Ind. 525, 530. We perceive no reason why we should disturb the judgment. We find no error in the record.

Judgment affirmed.

HORD v. THE STATE.

[No. 20,509. Filed January 10, 1907.]

1. **CONTRACTS.—Parties.—State.—Principal and Agent.—Statutes.**—The burden is upon the plaintiff, in an action against the State, to show a statute expressly or impliedly authorizing his employment, through its contracting officer, before he can establish a liability. p. 631.
2. **OFFICERS.—Public.—Dealings with.—Principal and Agent.—Notice.**—All persons dealing with a public officer are bound, at their peril, to take notice of the authority of such officer to bind his principal. p. 632.
3. **SAME.—Attorney-General.—Unauthorized Contracts.—Ratification.**—Contracts executed by the Attorney-General on behalf of the State, must be sanctioned by a statute, and if not, they are unauthorized and can be ratified only by the legislature. p. 632.
4. **SAME. — Attorney-General. — Assistants. — Compensation.—Statutes.**—Under §5670 R. S. 1881, Acts 1873, p. 18, §11, the Attorney-General had the legal right to employ assistants and to pay them for their services a sum not exceeding ten per cent of the amount of any moneys whatsoever collected by them for the State. p. 633.
5. **SAME. — Attorney-General. — Assistants. — Compensation.—Statutes.**—Under §§7692, 7693 Burns 1901, Acts 1889, p. 124, §§9, 10, the Attorney-General has the right to employ assistants and to pay them not to exceed ten per cent of the money collected by them, except that due from the United States to the State because of direct taxes paid by such State during the civil war. p. 637.
6. **SAME.—Attorney-General.—Assistants.—Tenure of Service.**—Under §§7692, 7693 Burns 1901, Acts 1889, p. 124, §§9, 10, the Attorney-General has no authority to appoint assistants, for the collection of money due to the State, who shall serve for a longer time than during his official term. p. 638.
7. **SAME.—Deputies.—Tenure.**—In the absence of a statute, the tenure of office of a deputy or assistant is, subject to removal at any time, for the term of office of the principal; and where such principal is reelected, such deputies or assistants, to hold over, must be reappointed. p. 640.
8. **STATUTES.—Doubts.—Construction by Administrative Departments.—Usage.**—Where a statute is plain and free from doubt, the courts, in the construction thereof, will not resort to the

167	622
170	404

167	622
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construction placed thereon by the administrative departments, nor can the meaning thereof be changed or varied by usage. p. 641.

9. CONSTITUTIONAL LAW.—*Contracts.—Impairment.*—The protection of the federal Constitution does not extend to contracts until they are created. p. 642.

From Superior Court of Marion County (G. T. 65,807); *John L. McMaster, Vinson Carter and Vincent G. Clifford (Pro tem.)*, Judges.

Action by William B. Hord against the State of Indiana. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Addison C. Harris and *Frank C. Cutter*, for appellant.
Charles W. Miller, Attorney-General, *C. C. Hadley*, *L. G. Rothschild* and *W. C. Geake*, for appellee.

JORDAN, J.—This action was commenced by appellant, William B. Hord, in the Superior Court of Marion County, Indiana, under §1419 Burns 1901, Acts 1895, p. 231, to recover a money judgment of over \$80,000 against the State of Indiana, arising, as alleged, out of contract. The complaint consists of two paragraphs. Separate demurrers to each for insufficiency of facts were filed by the State. These demurrers were sustained, and thereupon appellant elected to abide by his complaint, and judgment was rendered that he take nothing and that the State recover costs. From this judgment he has appealed to this court, and by the errors assigned he challenges the ruling of the lower court upon the demurrers in question. It is further assigned and argued by appellant's counsel that the State, in denying him compensation for his services and expenditure of moneys made by him, as alleged in the complaint, impairs the obligation of the contract set out in the complaint, and that this results in denying him the equal protection of the laws, and deprives him of his services and property without due process of law; all in violation of the provisions of the federal Constitution. The first para-

graph of the complaint declares upon a written contract alleged to have been entered into by and between appellant and the State of Indiana, through its Attorney-General, on April 3, 1889, whereby appellant was employed to prosecute and collect from the United States for the State of Indiana certain claims known and denominated as "war claims." The second paragraph of the complaint counts upon a *quantum meruit*, and thereunder appellant seeks to recover against the State for services rendered by him at its request in the prosecution and collection of the aforesaid claims.

As a preliminary, the first paragraph of the complaint discloses the passage in 1861, by the congress of the United States, of certain acts for the purpose of indemnifying the several states of the Union for expenses incurred by each in defending the United States in the Civil War of 1861, etc. It is further shown that the State of Indiana, during the period of said war, expended for and advanced to the United States government large sums of money, amounting in the aggregate to \$800,000; that after the close of said war the State, from time to time, made unsuccessful efforts to secure from the United States the payment, in whole or in part, of its said claims. It is further alleged that the State, although unsuccessful in the collection of these claims, insisted that large sums of money were due to it from the United States on account of these war claims, and accordingly, on March 5, 1889, the legislature passed a statute pertaining to the office of the Attorney-General and to the collection of the claims in question. It is averred in the pleading that these claims of the State against the United States government were provided for by a proviso, or provision, in section nine of said act (Acts 1889, p. 124, §7692 Burns 1901) in these words: "Provided, that the Attorney-General or his assistants shall not receive any commission or fees for or on account of the collection from the United States of the money paid by

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the State of Indiana to the United States as direct tax during the War of the Rebellion; but for the collection of any other moneys due the State of Indiana from the United States he shall be allowed a commission of ten per cent on the amount collected." In the same connection the complaint avers that "it was said sum, among other claims, that by said act of the legislature the Attorney-General was authorized to employ aid and attorneys in the collection thereof, and to pay such aid and attorneys out of the sums so collected a sum not to exceed ten per cent of the amount collected." It further alleged that under the authority of said act of 1889 Louis T. Michener, the Attorney-General of the State, did appoint and employ appellant as attorney for the State of Indiana to collect the money due to it from the United States. This appointment was made by and under a written commission, issued to appellant, in the words and figures as follows:

"Indianapolis, April 3, 1889.

I, Louis T. Michener, Attorney-General of the State of Indiana, under and by the authority conferred on me by section ten of the act providing for the election, prescribing the power and duties, and fixing the compensation of the Attorney-General of Indiana, approved March 5, 1889 (Acts 1889, p. 124, §7693 Burns 1901), do hereby nominate, constitute, and appoint William B. Hord, of the city of Indianapolis, in the State of Indiana, my assistant to prosecute, establish, and secure any and all claims due or owing to the State of Indiana by the general government, except the money paid by the State of Indiana to the United States as a direct tax during the War of the Rebellion, and he is fully authorized and empowered to take any and all necessary proceedings to secure the same.

Louis T. Michener,
Attorney-General of Indiana."

It is averred that on the same day that appellant was appointed by Attorney-General Michener as aforesaid, the State of Indiana entered into a written contract with him,

which contract is set out and made a part of the first paragraph of the complaint and is as follows, to wit:

“Whereas, Louis T. Michener, Attorney-General of the State of Indiana, has this day appointed William B. Hord, of the city of Indianapolis, in the State of Indiana, assistant to prosecute, establish, and secure any and all claims due or owing to the State of Indiana by the general government, except the money paid by the State of Indiana to the United States as direct tax during the War of the Rebellion. It is hereby agreed by said Hord that he will diligently prosecute said claims. If the State of Indiana realizes any money under his prosecution, said Attorney-General hereby agrees that said Hord is to be paid ten per cent of the sum or sums so collected, as allowed by law for an assistant under section ten of ‘an act providing for the election, prescribing the powers and duties, and fixing the compensation of the Attorney-General of Indiana,’ etc., approved March 5, 1889 (Acts 1889, p. 124). It is hereby further agreed and understood, inasmuch as the term of office of Louis T. Michener, as Attorney-General, may expire before it is possible to complete the collection of said claims, that this appointment shall be continuing so long as said Hord shall continue diligently to prosecute said claims.

Louis T. Michener,
Attorney-General of Indiana.
William B. Hord.”

This contract as shown was made with the full knowledge and consent of the Governor, Auditor and Treasurer of the State of Indiana, and copies thereof were on the day of its execution filed in the office of the Governor and Attorney-General of the State and with the war department and other departments of the United States government. The pleading proceeds to aver that it is the rule of construction “in the legal and executive departments of said State that an employment, made by the Attorney-General, of any attorney for said State in the matter of a suit or proceeding, requiring skill, time, and great labor

on his behalf, and especially where the fees are contingent on success, that said employment was to continue until said cause was finally determined, not simply during the unexpired term of the Attorney-General making the employment of the State. And so is the law." It is then alleged that, immediately after the appointment of appellant herein, the latter set about the work of collecting said war claims, and, among other things, he prepared and made for the State an itemized claim against the United States, which in the aggregate amounted to \$714,476.62; that this claim as made out was examined and approved by Alvin P. Hovey, then Governor of the State of Indiana, and by the Auditor and Treasurer of said State, and appellant, as attorney of the State under his said appointment and employment, filed, with the approval of the aforesaid officers, said claim for and in the name of the State of Indiana in the treasury department of the United States. The various steps taken by appellant and the series of services performed by him in the furtherance of the collection of the claim in question are all fully alleged and shown, until finally the paragraph avers that the United States, in the year 1902, audited, allowed, and paid to the State of Indiana, in satisfaction of said claims, the sum of \$800,000, and that thereby a commission of ten per cent of said amount so collected by appellant for the State became due and owing to him under his said contract of employment, which amount of commission it is averred is still due and unpaid, and which the State, upon his demand, has wrongfully refused and still refuses to pay to him; that in addition to this amount it is alleged there is due to him the sum of \$5,000 expended and paid out by him in the prosecution of the aforesaid claims.

The pleading further avers that from time to time during the prosecution of the claim in question appellant kept the Attorney-General and other officers of the State of Indiana advised in regard to his action in the matter, and

was at all times recognized by successive Attorneys-General and state officers, and that his services and acts in the premises were approved by them; that it was not until after the United States, through its proper officers, had declared that the claim of the State which appellant was prosecuting was just and ought to be paid, and after the congress of the United States had indicated that a law would be passed, authorizing the claim in question to be audited and paid to the State of Indiana, that the then Attorney-General of the State of Indiana, William L. Taylor, wrongfully and unlawfully refused to coöperate with appellant and his associates, Messrs. Michener and Dudley, and wrongfully asserted and claimed that he, said Taylor, possessed the sole right to be the attorney and to represent the State of Indiana in the matter of the collection of said claim; that notwithstanding the aforesaid acts of the State's Attorney-General in refusing to allow appellant and his associates further to act in the prosecution of said claim, he, appellant, knowing that his contract of employment with the State of Indiana was binding on the latter as well as himself, continued to do all and singular that which was in his power to secure the payment of said claims, and that he had in all things fully and faithfully performed said contract on his part, etc. The paragraph closes with the demand for \$80,000, and all proper relief.

The second paragraph, as previously stated, relies upon a *quantum meruit*. The plaintiff, after setting out therein facts similar to those alleged in the first paragraph, disclosing the origin of the war claims in question in favor of the State against the federal government, avers that his said services rendered in the collection of these claims were rendered at the instance and request of the defendant, the State of Indiana, made and given to him, first, to wit: April 3, 1889, by the joint and several action of the Governor, Attorney-General, Auditor and Treasurer of State, by whom he was directed to take charge, direction, and

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control of the matter of presenting and collecting the claims in question; that from said April 3, 1889, up to and including the year 1902, each and every succeeding Attorney-General of said State and each and every succeeding Governor thereof and said other state officers, ratified and confirmed the agency and attorneyship of plaintiff in acting for the State of Indiana in said matter and aided and assisted him when necessary in his work, and that these officials were kept advised by plaintiff of the efforts which he was making as such agent and attorney in the collection of said claims; that through his efforts, aided by Messrs. Dudley and Michener, who were operating with him in said matter, together with the coöperation of the State's delegation in congress, the State, in the year 1902, received and was paid by the United States government the sum of \$800,000; that under the terms of his employment the State agreed that he should be paid for the services which he rendered and for the money which he expended in the prosecution of the claim out of the money collected therein. It is alleged that after appellant had secured the United States government to recognize the claim as just, and after congress had passed an act for the payment thereof, the Attorney-General of the State, William L. Taylor, wrongfully advised and directed the United States treasury department not to pay appellant the money allowed to the State upon its claim, but, on the contrary, procured all of the money to be paid over to the State of Indiana. The value of appellant's services and the amount of money expended by him in the prosecution of the claims in question are shown by the proper averments and exhibits filed in the second paragraph of the complaint, and a recovery in the sum of \$100,000 and all proper relief is demanded.

One of the contentions of appellee in this appeal is that the Attorney-General who dealt with and is alleged to have

employed appellant under and by the contract relied upon had no legal warrant or authority for his act in the premises. Appellee's counsel concede that Mr. Michener, as Attorney-General at that time, was empowered to appoint or employ appellant as his assistant to aid him in the collection of moneys due and belonging to the State of Indiana and to compensate him for his services by paying him a commission not exceeding ten per cent of the amount of money collected by him. But it is argued that the employment or appointment of appellant for such purpose could not have been made to extend or continue beyond the official term of Michener as Attorney-General. It is specially insisted that there was an entire absence of any authority or right on the part of Michener to execute on behalf of the State the contract in question and thereby employ appellant generally to represent and serve the State as its attorney in the collection of the claims in controversy. On the other hand, counsel for appellant contend that their client, as shown under the facts, was not an officer of the State, whose official services terminated with the term fixed by law. They contend that he cannot be considered as a deputy officer whose services cease or terminate with the expiration of the term of his superior, but that he must be regarded as an employe of the State under the contract for a special or specific purpose and that his employment continued until the specific or particular purpose for which he was employed was accomplished.

They argue that it was competent for the State's legislature to authorize, and for its Attorney-General to enter into, such a contract on behalf of the State, in view of the character and nature of the claims to be collected, and that the contract herein cannot be considered as invalid because it professes to continue the employment longer than the official life of the Attorney-General by whom the contract was executed. His counsel further contend that under the

facts alleged in the complaint, especially in the second paragraph thereof, the State, through its Attorneys-General, Governors, Auditors and Treasurers, subsequently ratified and confirmed the employment and attorneyship of appellant and therefore the State, in view of said ratification, must be held liable from the beginning of the employment for the services which he is shown to have performed. This latter proposition is combated by counsel for the State on the ground that the power of these officials to ratify and make the employment of appellant valid and binding upon the State was no greater than their authority to contract with him on behalf of the latter in the first instance. It is argued that if the Attorney-General, the Governor, Auditor and Treasurer had no power to enter into the contract in suit, or make the employment in controversy, said officers would have no authority to bind the State in any manner by ratification; that what could not be done directly, could not be performed by indirection.

It is evident that, under the issue raised upon the complaint herein, the onus is upon appellant to show that

Attorney-General Michener, the supposed agent of

1. the State, in making the contract, was exercising the power conferred, either expressly or impliedly, upon him by the statute. Such a statute, if any, must be regarded as the letter of his special agency in the matter, and beyond it he could not go and thereby bind the State or create any liability against it. This proposition is well settled by the authorities. *Julian v. State* (1890), 122 Ind. 68, and cases cited; *McCaslin v. State, ex rel.* (1885), 99 Ind. 428; *Moon v. Board, etc.* (1884), 97 Ind. 176; *Wrought Iron Bridge Co. v. Board, etc.* (1898), 19 Ind. App. 672; *Woodward v. Campbell* (1882), 39 Ark. 580; *Mitchell v. Board, etc.* (1878), 24 Minn. 459; *Mayor, etc., v. Reynolds* (1863), 20 Md. 1, 10.

It is an equally well-settled rule that all persons dealing with public officers, whose power or authority to represent

and bind the State, or some subordinate municipal-
2. ity thereof, depends upon or is limited by statute,
are charged at their peril with notice of the scope
of the power of such officers under such statute. *Julian v. State* (1890), 122 Ind. 68, and authorities cited; *Julian v. State* (1895), 140 Ind. 581; *City of Indianapolis v. Wann* (1896), 144 Ind. 175, 31 L. R. A. 743; *Whiteside v. United States* (1876), 93 U. S. 247, 23 L. Ed. 882; *State, ex rel., v. Hays* (1873), 52 Mo. 578; *McGillivray v. Joint School District* (1901), 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100, 88 Am. St. 969.

In *Julian v. State* (1890), 122 Ind. 68, the question was involved in relation to the power of the Attorney-General, with the approval of the Governor, Auditor

3. and Treasurer of State, to employ an attorney at law to prosecute suits for the State in the recovery of certain lands. Such authority on the part of the Attorney-General, under the law in force at that time, was denied by the court in that case. In the course of the opinion by Olds, J., the court said: "It is a well-settled doctrine that officers of the State exercise but delegated power, and this is particularly true of the Attorney-General. His office is created by statute, and he, as such officer, can only exercise such power as is delegated to him by statute. A contract made with the Attorney-General is void unless he is expressly or impliedly authorized by statute to make such contract." If the contract upon which appellant claims to have been employed was executed by Attorney-General Michener without authority of law, then he, his successors, the Governor, Auditor and Treasurer of State could not ratify and confirm the unauthorized act, in the absence of any authority or power conferred upon them or either of them, by the legislature to ratify and confirm his employment, for it must be conceded that the power of these officials to ratify the unauthorized contract of employment of appellant on behalf of the State would

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be subject to the same limitations as was the authority or power under the statute to enter into the contract with him in the first instance. In the absence of statutory power on the part of Attorney-General Michener to enter into the contract of employment with appellant, the legislature of the State would be the only competent power to ratify and confirm the unauthorized act of the Attorney-General, or to authorize the ratification thereof by some designated person or persons. *Schneck v. City of Jeffersonville* (1899), 152 Ind. 204, and cases cited; *Peck-Williamson, etc., Co. v. Steen School Tp.* (1903), 30 Ind. App. 637; *Wrought Iron Bridge Co. v. Board, etc., supra*; *State, ex rel., v. Hays, supra*; *McGillivray v. Joint School District, supra*; *Delafield v. State* (1841), 26 Wend. 192.

Having in view the principles which we have herein asserted, we may, in order to determine the power invested in the Attorney-General by the legislature, turn to

4. an examination of the statutes pertaining to his office, enacted prior to the date of the employment of appellant. The office of Attorney-General was first created under a statute passed in 1855 (Acts 1855, p. 16). By sections four and six of this act the only duties enjoined upon this official were to prosecute and defend all suits against the State, the prosecuting or defending of which had not already been provided for by law, and to furnish, on application, written opinions to state officers or to either branch of the General Assembly. No provisions were made by this act authorizing the Attorney-General to appoint or employ deputies or assistants to aid him in the discharge of his official duties. In 1861, section four of the act of 1855, *supra*, was amended to the extent of requiring the Attorney-General to prosecute and defend all criminal or state prosecutions pending in the Supreme Court (Acts 1861 [s. s.], p. 14, §5659 R. S. 1881). By a supplemental act passed in 1873 (Acts 1873, p. 18, §§5661-5671 R. S. 1881), the powers and duties of this

officer were much enlarged. By section nine of this act it was made the duty of the Attorney-General to ascertain from time to time the amounts paid to any public officer of the State or any county officer or other person for unclaimed witness fees, docket fees, licenses, money unclaimed in estates or guardianships, fines or forfeitures, etc., and where such money was required under the law to be paid to the State, or to any officer in trust for the State, and in all cases where the officers whose duty it was to collect such money had failed, neglected or refused for twelve months after the cause of action in favor of the State had accrued, or who had failed, neglected, or refused to sue for and proceed to recover any property belonging to or which might have escheated to the State, the Attorney-General was authorized to institute, or cause to be instituted and prosecuted, all necessary proceedings to compel the payment of such money or the recovery of such property. For collections made or for property recovered under the provisions of this section he was allowed a commission of twenty per cent on the first \$1,000, and ten per cent on sums not exceeding \$2,000, and on all sums exceeding \$2,000 five per cent.

Section eleven of this supplemental act reads as follows: "The Attorney-General may employ and have such assistants to aid him in the discharge of the duties imposed upon him by the provisions of this act, and pay to them, out of the sums so collected by such person or persons, a sum not exceeding ten per cent of the sum or sums so collected." Under section twelve of this act the Attorney-General was authorized to have such clerks and deputies as the Governor, Secretary, and Auditor of State might deem to be necessary. The legislature in 1889, by an act approved and in force March 5 (Acts 1889, p. 124, §7683 *et seq.* Burns 1901), virtually re-created the office of Attorney-General and provided that the term of such official should be for two years from and after his election in November

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and until his successor was elected and qualified. All that part of section nine of this latter act which precedes the proviso thereof is but a reenactment of section nine of the supplemental act of 1873, *supra*, except the following provision is added thereto: "The fees of the Attorney-General and his assistants for the collection of any fund which does not bear the expense of its collection, shall be paid out of any money in the treasury not otherwise appropriated." It is the part of section nine of the act of 1889, *supra*, contained within the proviso, together with the provisions of section ten of the same act, upon which counsel predicate the right or authority of Michener as Attorney-General to employ appellant on behalf of the State to perform the services here involved. We here set out in their order the provisions of section nine of the act of 1889 embraced within the proviso therein and also section ten of said act:

"Section nine. * * * *Provided*, that the Attorney-General or his assistants shall not receive any commission or fees for or on account of the collection from the United States of the money paid by the State of Indiana to the United States as direct tax during the War of the Rebellion, but for the collection of any other moneys due the State of Indiana from the United States, he shall be allowed a commission of ten per cent on the amount collected. And, for the purpose of enabling the Attorney-General to ascertain the facts herein contemplated, it is hereby made the duty of the officers having the custody of any such moneys to report to said Attorney-General, upon oath or affirmation, all the facts pertaining thereto upon his demand in person, by deputy or assistants, or in writing; and any such officer failing to render such information upon such demand shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding \$100.

Section ten. The Attorney-General may employ and have such assistants to aid him in the discharge of the duties imposed upon him by law, and to pay to

them out of the sum so collected by them a sum not exceeding ten per cent of the sum or sums so collected.”

A comparison of section eleven of the act of 1873 with section ten of the act of 1889 discloses that the latter section, with but two unimportant exceptions, is a reenactment of the former section. Sections two, three, nine, and eleven of the supplemental act of 1873 were before this court for construction in the appeal of *State, ex rel., v. Denny* (1879), 67 Ind. 148. This was an action prosecuted by the State, on relation of the Attorney-General, to recover money from James C. Denny, formerly an incumbent of that office. It was claimed in that case that he, as such official, had, during his term of office, received certain moneys belonging to the State which he had refused to account for and pay over. It was said by the court, in the course of its opinion therein, that the object or purpose of the legislature in passing the aforesaid supplemental act of 1873 was more fully to lodge the administration of the State's legal business or affairs where they properly belonged, under the control and management of its Attorney-General, the highest law officer of the State, and to empower him to collect moneys belonging to the State and its trust fund in the hands of state or county officers and other persons, which money had been retained by these persons long beyond the time when it should have been paid into the proper treasury. In construing section eleven of the supplemental act, which provided for the employment of assistants by the Attorney-General, the court in the case of *State, ex rel., v. Denny, supra*, held that thereby the legislature expressly authorized the Attorney-General to employ and have assistants to aid him in the discharge of the duties imposed upon him by the provisions of said act, and to pay them for their services a sum not exceeding ten per cent out of the money collected by them. While section nine of the supplemental act of

1873 did not in express terms profess to authorize the Attorney-General to collect claims due the State from the federal government, nevertheless, this court, in the case of *State, ex rel., v. Denny, supra*, held that it was his duty to collect such claims, and that under the provisions of section nine he was entitled to the commission therein provided for the collection thereof.

Certainly then, under the construction accorded to the provisions of that section by this court, which provisions as we have already said were reënacted by the act

5. of 1889, and aside from the proviso in question now constitute section nine of the latter act, the powers of the Attorney-General in respect to the collection of war claims, etc., due the State from the United States have not been enlarged by section nine of the latter act, as insisted by appellant's counsel. When the provisions of this section are considered, we think it may be said that the legislature seemingly recognized the fact that by the reënactment of the provisions of section nine of the act of 1873 into the same section of the act of 1889, under the construction placed upon it by this court in the case of *State, ex rel., v. Denny, supra*, the Attorney-General would be empowered and it would be his duty to collect any and all money due the State from the United States, for, by the provisions of the proviso, it is expressly declared "that the Attorney-General or his assistants shall not receive any commission or fees for or on account of the collection from the United States of the money paid by the State of Indiana to the United States as a direct tax during the War of the Rebellion," evidently intending by this declaration that the Attorney-General should be deemed and held to be compensated for the collection of such direct tax by the regular salary provided. For the collection, however, of money due the State from the federal government, other than that paid on account of the direct tax, he was to be allowed a commission of ten per cent on the amount collected. Cer-

tainly there is no ground for asserting that the proviso of section nine, together with the provisions of section ten of the act of 1889, should be held to authorize or empower the Attorney-General to enter into the contract in question, whereby he attempted to appoint or employ appellant as his assistant to collect the money in controversy to serve for a period of time which, as expressly recognized and contemplated under the provisions of the contract, would extend beyond the official term of the Attorney-General making the appointment.

Had the legislature, under the provisions of section ten of the act of 1889, intended to invest the Attorney-General with authority to employ an attorney to serve the State generally for an unlimited period of time extending beyond his official term, in the prosecution of any and all claims due or owing to the State of Indiana, as stipulated in the written contract, that body would certainly have conferred such extraordinary power upon him in apt words or language. The contention as advanced by the State is that under the provisions of section ten, *supra*, Attorney-General Michener was not empowered to appoint and constitute appellant an attorney for the State in the matter in question, to serve as such beyond his official term, which, as it appears, terminated November, 1890, at which time his successor was elected and qualified, and unless he was reinvested with authority by appointment or employment of some subsequent incumbent of the office, he could not, therefore, legally continue to serve under the appointment in question after the expiration of the official term of Michener. This contention is tenable and is well supported by the authorities. It will be observed that section ten does not in any manner profess to grant to the Attorney-General the power to employ an attorney to serve independently of that official, but he is only authorized to employ or have assistants to aid him in the discharge of the duties imposed upon him by law. While such assist-

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ants cannot be considered as general deputies of the Attorney-General, nevertheless they must at least be regarded, under the provisions of the law, as special deputies to aid or assist him in the collection of all sums of money or claims due or owing to the State of Indiana. The section in question cannot be construed or interpreted to authorize Attorney-General Michener to employ appellant to continue to prosecute for the State the collection of its claims for a time beyond the expiration of his own official term; that he was not invested with such power, appellant was bound to take notice. *Julian v. State* (1890), 122 Ind. 68.

He was only authorized to employ and have assistants to aid him in the discharge of the duties imposed upon him by law. The very language of the statute makes it plain that the legislature did not intend that the appointment or employment of assistants by the Attorney-General was to run indefinitely with the office and that such appointees should continue to hold and serve under the successors of the officer making the appointment. Or, in other words, the statute did not contemplate that such employment should continue until the work to be performed by the assistants was completed, although the completion thereof might extend long beyond the term of the Attorney-General making the appointment. Were we to sanction the contention of appellant's counsel in this respect, then it would follow that an assistant or assistants of the Attorney-General would continue to serve as such, although the office had been abolished by the legislature. We are not to be understood as denying the right of the legislature to empower the Attorney-General to employ an attorney to perform legal services for the State and to authorize the continuance of such employment until the work for which he was employed is accomplished, regardless of the expiration of the official term of the Attorney-General by whom he is employed. But that is not the question with which we have to deal in this appeal. That Michener, as Attor-

ney-General, was not invested with any such power under the statute as that last-above mentioned in appointing his assistants is manifest. Not having authority to continue the employment of appellant beyond his official term, no legal liability rests on the State to pay for the services rendered. He apparently recognized the fact that he was only empowered by the statute to appoint appellant as his assistant, and not as an attorney to perform services for the State independently of the office of Attorney-General. This is evident by the language used in making the appointment, for it is therein stated that "I, Louis T. Michener, Attorney-General, * * * do hereby nominate, constitute, and appoint William B. Hord, * * * *my assistant* (our italics) to prosecute," etc. Mr. Michener apparently recognized the fact that the collection of the claims, which he appointed appellant as his assistant to collect, could not be completed during his official term; consequently, under a mistaken view of the law no doubt, he attempted to enlarge his authority in this respect by declaring that the appointment of appellant as his assistant should continue as long as the latter diligently prosecuted the collection of the claims. The general and well-affirmed rule is that, in the absence of some statu-

7. tory provision to the contrary, the commission or appointment of a deputy officer runs or continues only during the term of the officer making the appointment. Of course, in the absence of a statute to the contrary, the principal has the right, at his pleasure, to remove his deputy. If the principal officer is reelected or reappointed for another term, his deputies must also be reappointed in order to continue them in office. The doctrine that the term of the deputy will expire at the close of the term of his principal is well affirmed by the following authorities: 9 Am. and Eng. Ency. Law (2d ed.), 382, and note; Throop, Pub. Officers, §582; *State, ex rel., v. Barrows* (1898), 71 Minn. 178, 73 N. W. 704; *Banner v. McMur-*

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ray (1827), 12 N. C. 219; *Thomas v. Summey* (1854), 46 N. C. 554; *Boardman v. Halliday* (1843), 10 Paige 223; *Greenwood v. State* (1856), 17 Ark. 332; *United States v. Wood* (1819), 2 Cranch C. C. 164, Fed. Cas. No. 16,753; *State, ex rel., v. Board, etc.* (1878), 7 Neb. 42; *Richmond Mayoralty Case* (1870), 19 Gratt. (Va.) 673; *Jackson v. Collins* (1824), 3 Cowen 89.

These authorities fully sustain the proposition that appellant's appointment or employment as the assistant of

Attorney-General Michener terminated with the

8. expiration of the latter's official term. The fact that subsequent incumbents of the office knew of his appointment, or acquiesced therein, would not alone be sufficient to reinvest him with authority to continue to represent the State as the assistant of the Attorney-General. He must be shown to have been reappointed or reemployed by the successive Attorneys-General as their assistant to continue the prosecution of the claims in controversy. It is contended by counsel for appellant that certain department officers of the State are shown to have placed a construction upon the provisions of section ten of the act of 1889, which construction is consistent with and in harmony with that for which they contend and should control the court in the interpretation of the law. But there is no ambiguity upon the face of the statute in question in respect to its meaning or purpose. The meaning of the provisions of the section in question is plain or manifest, consequently there is no reason for resorting to departmental construction. The latter is only influential as an interpreter of a doubtful or ambiguous law and will never be permitted to defeat the evident meaning or purpose of a statute. Neither can the power conferred on the Attorney-General by the positive provisions of the statute in controversy be varied or enlarged by usage. *Sutherland, Stat. Constr.*, §308; *Attorney-General v. Bank* (1847), 40 N. C. 71; *Gwyn v. Hardwicke* (1856), 1 H. & N. 49, 53;

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Pochin v. Duncombe (1857), 1 H. & N. 842, 856; *Westbrook v. Miller* (1885), 56 Mich. 148, 22 N. W. 256; *Delafield v. State* (1841), 26 Wend. 192.

It is finally insisted that the federal Constitution protects the contract involved in this action, and that, therefore, if the decision of the lower court is sustained,

9. appellant's contract will be impaired or destroyed in violation of the federal Constitution. But before he can claim such constitutional protection it must appear that, under his employment by Attorney-General Michener, a contract on the part of the State of Indiana was created, and that the State, under the construction of the law for which it contends, has secured, under the decision of the lower court, an impairment of such contract.

As we have shown, under the plain provisions of the statute in controversy the Attorney-General was not authorized to make in behalf of the State the contract here involved, and, consequently, the latter is invalid so far as the State is concerned. There is no contract to be protected by the provisions of either the federal or state Constitution. Upon no view of the case, under the law applicable thereto, does either paragraph of the complaint state a cause of action against appellee. Therefore, the lower court did not err in its ruling upon the demurrers.

Judgment affirmed.

All concur, except Gillett, J., not voting.

STARK ET AL. v. LAMB ET AL.

[No. 20,568. Filed October 10, 1906. Rehearing denied January 11, 1907.]

1. FRAUDULENT CONVEYANCES.—*Setting Aside.—Joint Debts.—Legal Remedy against Part of Debtors.*—A creditor cannot resort to equity to set aside a fraudulent conveyance of one joint debtor and subject the property conveyed to the payment of his claim, where he has an adequate legal remedy for the collection of his claim from other joint debtors. p. 645.

2. **FRAUDULENT CONVEYANCES.—*Setting Aside.—Legal Remedy against Joint Debtor.***—Special findings in a suit to set aside a fraudulent conveyance, showing that defendant fraudulently transferred his property to himself and wife; that he thereby became insolvent; that such transfer was made without consideration, and that the defendant's joint obligor was discharged in bankruptcy from the payment of such debt, support a conclusion of law that such conveyance should be set aside. p. 645.
3. **SAME.—*Setting Aside.—Subsequent Bankruptcy of Solvent Joint Debtor.***—The insolvency of defendant's joint debtor, subsequent to defendant's fraudulent conveyance of his property, does not preclude the plaintiff creditor from setting aside such conveyance and subjecting defendant's property to the payment of his debts. p. 645.
4. **SAME.—*Evidence.***—To set aside a conveyance as fraudulent, the plaintiff must prove facts which either directly or by inference show that such conveyance was made with a fraudulent intent. p. 646.
5. **EXECUTION.—*Property Liable to.—Exemptions.—Evidence.—Prima facie*** all property of a debtor is subject to execution; and therefore proof that the conveyance in question was voluntary and without consideration, or made with fraudulent intent, establishes a *prima facie* case. p. 646.
6. **FRAUDULENT CONVEYANCES.—*Sales.—Exempt Property.***—A debtor's conveyance cannot be set aside as fraudulent, where his property is not subject to execution, being exempt by law. p. 647.
7. **SAME.—*Setting Aside.—Exemptions.—Presumptions.***—Where the proof shows that the debtor had less than the amount of property which he might claim as exempt, the presumption is that he claims such exemption, and it is the duty of the court to find that such conveyance was not fraudulent. p. 647.
8. **SAME.—*Setting Aside.—Exemptions.—Evidence.—General Denial.***—Under the general denial to a suit to set aside a conveyance as fraudulent, evidence is admissible to show that the defendant's property at the time of the conveyance was not subject to execution, and therefore the conveyance was not fraudulent. p. 647.
9. **SAME.—*Exemptions.—Special Findings.***—The absence of a special finding that the alleged fraudulent conveyance covered property which was exempt by law, leaves a presumption that the court in finding that the conveyance was made with intent

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to defraud his creditors, found such fact in view of the law giving such creditor a right to transfer his exempt property without being subject to the imputation of fraud. p. 648.

From Elkhart Circuit Court; *James S. Dodge*, Judge.

Suit by Ellington C. Lamb against Henry Stark and others. From a decree against Henry Stark and wife, they appeal. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed*.

James L. Harman and *Edward B. Zigler*, for appellants.

Perry L. Turner, for appellee Lamb.

MONTGOMERY, J.—Appellee Lamb brought this suit to collect a promissory note executed by Milo W. and Henry Stark, and to set aside, as fraudulent, certain conveyances of real estate. Milo Stark was adjudged a bankrupt pending the litigation, and the action dismissed as to him. Appellants answered by general denial, and, at their request, the court made a special finding of facts, in substance as follows: Milo and Henry Stark executed the note August 19, 1901, which now amounts to \$223, and at the date of the note Henry owned real estate as described, and Abbie N. Stark was his wife. Henry continued to own the real estate until April 27, 1903, when he and his wife conveyed the same to David Lingman, who on the same day, without consideration, reconveyed it to Henry and his wife. On April 27, 1903, and continuously afterwards, Henry was and remained a resident householder of Elkhart county, Indiana, and had no property, other than said real estate, subject to execution. At the date of said conveyances Milo Stark owned property of the value of \$2,682, and was indebted to the amount of \$550, but on September 11, 1903, he was insolvent and subsequently adjudged a bankrupt and duly discharged in bankruptcy. Said conveyances were made to protect said Abbie N. Stark in the possession and use of the whole of said real

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estate, and with intent to defeat and defraud the creditors of said Henry Stark. The second conclusion of law stated upon such facts is as follows: "Said conveyances from the defendants, Henry Stark and Abbie N. Stark, to David Lingman, and from said David Lingman to the defendants, Henry Stark and Abbie N. Stark, are each fraudulent and void as against the plaintiff, and should be set aside."

It is alleged that the court erred in this conclusion of law, and argued that in the absence of a finding that Milo

Stark as well as Henry was insolvent at the time

1. the fraudulent conveyances were made this conclusion cannot be sustained. It is a familiar principle that resort to a court of equity may not be had, so long as an adequate legal remedy exists. In the application of this rule it has been held by this court that, so long as a legal remedy exists against one or more joint debtors, equity will not extend its relief and set aside a fraudulent conveyance of another of such debtors at the instance of the common creditor. *Eller v. Lacy* (1894), 137 Ind. 436. See, also, *Geiser Mfg. Co. v. Lee* (1903), 33 Ind. App. 38.

It is specifically found that Henry Stark was insolvent at the time of making the conveyances attacked, and at all times since, and that the deeds were without con-

2. sideration and made with fraudulent intent. Milo

Stark was solvent at the time the deeds were made, but became insolvent a few months afterwards, and was subsequently adjudged a bankrupt and discharged from his financial obligations. It is therefore plain that appellee Lamb must collect his debt from the real estate in controversy, or lose it. The circumstance that Milo Stark was solvent at the time the fraudulent conveyances were

3. made, does not make them any the less fraudulent, and the rule forbidding a premature resort to equity was not intended to take away a right of action and deny a salutary remedy, but merely to limit their exercise to cases

of actual necessity and thereby prevent unnecessary litigation. No substantial reason is shown why appellee should not avail himself of the remedy sought in this suit, but, on the contrary, it is entirely clear that without equitable interference he would be wholly without relief.

The conclusion of law is supported by the facts found, and the judgment is affirmed.

ON PETITION FOR REHEARING.

MONTGOMERY, C. J.—Appellants' learned counsel have filed an earnest petition for a rehearing in which they properly call our attention to an omission to discuss a point made in their original brief. The special findings of the court stated that, at the time of executing the conveyance in question, "Henry Stark was a resident householder of Elkhart county, Indiana, and said Henry Stark had no other property of any kind subject to execution." The findings were silent as to the value of the property in controversy, and as to the total value of all property owned by Henry Stark at the date of the transfer attacked.

The insistence of appellants' counsel is that an affirmative finding that the property conveyed, together with other property owned by Henry Stark, was in excess of \$600, was indispensable to appellee's recovery.

It is contended first by appellee that as appellant Henry Stark had no answer on file specially setting up his right and claim to an exemption, he is in no position to

4. raise the question argued. We cannot agree with appellee in this contention. This suit is for relief against fraud, and it was incumbent upon appellee to establish the fraud charged, either by direct evidence or by proof of such other facts as warranted the inference of a fraudulent intent in making the transfers assailed. This court has heretofore decided that *prima facie* all property of a debtor within this State is liable for the payment

5. of his debts and subject to execution. *Moss v. Jenkins* (1897), 146 Ind. 589, 596, and cases cited.

It follows, therefore, that upon a complaint to set aside a conveyance as fraudulent, a *prima facie* case is made out upon proof that such conveyance was voluntary and without consideration, or that it was made with fraudulent intent to hinder, delay, cheat, or defraud the creditors of the grantor, and accepted by the grantee with knowledge of its fraudulent character.

It is quite well settled that property exempt from execution is not subject to the claims of creditors, and may be transferred by the owner, unaffected by any such

6. claims. The owner having a right to hold property exempt from the demands of his creditors has an absolute and unhampered right to transfer the same, and in doing so cannot legally be charged with defrauding his creditors or with an intent to do so. *Faurote v. Carr* (1886), 108 Ind. 123, 125; *Taylor v. Duesterberg* (1887), 109 Ind. 165, 170; *Barnard v. Brown* (1887), 112 Ind. 53; *Citizens State Bank v. Harris* (1897), 149 Ind. 208.

The law presumes that a resident householder will avail himself of his right to claim an exemption, and in a suit of this character, where it is made to appear affirm-

7. atively that the debtor was a resident householder of the State, and that all property owned by him at the time of the transfer in question did not exceed \$600 in value, a court of equity will not disturb such transfer as fraudulent. *Wallace v. Lawyer* (1876), 54 Ind. 501, 509, 23 Am. Rep. 661; *Williams v. Osborne* (1884), 95 Ind. 347; *Burdge v. Bolin* (1886), 106 Ind. 175, 55 Am. Rep. 724.

The issue in this case was one of fraud in making conveyances of real estate, and it was proper for appellants, to repel the charge of fraud, to show, if they could,

8. that the property conveyed was exempt from execution. Evidence to establish the facts showing a right to claim the property as exempt from appellee's demand was clearly admissible under the answer of general

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denial, and without a special plea. *Isgrigg v. Pauley* (1897), 148 Ind. 436; *Jeffersonville Water Supply Co. v. Riter* (1897), 146 Ind. 521.

The absence of a finding of facts showing that the property in controversy was exempt from appellee's claim, leaves the principle of law that such property was

9. *prima facie* liable therefor in force. The court expressly found that the conveyances in question were made "with intent to defeat and defraud the creditors of Henry Stark," and, nothing appearing to the contrary, it must be presumed that this finding was made with reference to the law, that such an intent could not legally exist with respect to conveyances of property within the exemption laws of the State.

We accordingly hold that the finding of facts is sufficient to sustain the conclusions of law, and overrule appellants' petition for a rehearing.

167	648
170	89

167	648
171	313
171	415

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY v. McCANDISH, ADMINISTRATOR.

[No. 20,849. Filed January 15, 1907.]

1. PLEADING.—*Complaint.*—*Negligence.*—*Railroads.*—*Highway Crossings.*—*Travelers.*—In an action by an administrator against a railroad company for negligently killing his decedent at a highway crossing, the complaint must show the facts disclosing a legal duty owing by such company and a negligent performance or failure to perform such duty. p. 651.
2. RAILROADS.—*Highway Crossings.*—*Care Required.*—*Travelers.*—*Trespassers.*—Railroad companies must use ordinary care to prevent injuries to travelers at highway crossings, and must refrain from wilful injuries to trespassers. p. 652.
3. PLEADING.—*Complaint.*—*Railroads.*—*Highway Crossings.*—*Travelers.*—*Characterizing Persons as.*—A complaint showing that the decedent "was on the east side of said railroad on the public highway * * * and was approaching the main line of the said defendant company * * * and he, * * * to avoid injury from said engine and train of cars, stopped, and

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was standing on the side track, awaiting the passage of said engine and train," fails to show that such decedent was a traveler at and on such highway crossing when injured. p. 652.

4. **PLEADING.—Complaint.—Inferences to Supply Facts.**—Necessary facts in a complaint cannot be supplied by intendment or by inference. p. 653.
5. **SAME.—Complaint.—Defective Premises.—Right of Injured Person to Occupy.**—In a complaint for an injury because of defective premises, it is necessary to allege by what right the injured person occupied such premises. p. 653.
6. **SAME. — Complaint. — Negligence.—Duty.—How Shown.**—A complaint for damages for negligence should set out the facts showing the true relationship of the parties from which the duty to use care arises. p. 653.

From Porter Circuit Court; *Willis C. McMahan*, Judge.

Action by Harry McCandish, as administrator of the estate of James Bragg, deceased, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for \$3,500, on plaintiff's remittitur of \$2,000 from a verdict for \$5,500, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

E. C. Field, *H. R. Kurrie* and *Crumpacker & Daly*, for appellant.

Lemuel Darrow and *H. W. Worden*, for appellee.

MONTGOMERY, C. J.—Appellee, as administrator, brought this action to recover damages for the death of James Bragg. The complaint, omitting the caption and prayer, is as follows: "The plaintiff complains of the defendant, and for his cause of action avers and says that he was duly appointed by the Laporte Circuit Court, as administrator of the estate of James Bragg, on July 9, 1903; that the defendant is, and was at the time hereinafter mentioned, a corporation duly organized under the laws of the State of Indiana, and owned and operated a railway known as the 'Chicago, Indianapolis & Louisville Railway,' over, through, and across the county of Laporte, and other counties in the

State of Indiana; that said railway was constructed across the highway in Dewey township, Laporte county, Indiana, immediately west of the village of Lacrosse, Indiana; that said highway over which said railway is constructed is fifty feet wide, twenty-five feet on each side of the center of the traveled track of said highway; that across said highway and at right angles therewith is located the main line of said defendant's track, and immediately east of said track is located a side-track; that the side-track was on June 20, 1903, filled with box-cars on both sides of the highway, extending from the center of said highway to within a few feet of the switch connecting the side-track with the main line of said defendant, which connection of said side-track with the main line is immediately north of the highway aforesaid where the same crosses the side-track and main track of said defendant; that said cars were allowed to remain on said side-track from June 20, 1903, until and after the injuries hereinafter complained of; that the defendant unlawfully and carelessly suffered and permitted the cars on said side-track to be and remain on the highway within ten feet of the center of the traveled track from June 20, 1903, until June 23, 1903, and there remained a space of but twenty feet for the traveling public to go to and fro over and across said side-track of said defendant at the point where the side-track crosses the public highway; that on June 22, 1903, James Bragg was on the east side of said railroad on the public highway moving westward near that point where the side-track crosses said highway, and was approaching the main line of said defendant, at which time an engine of the company was rapidly approaching the crossing on the main line from the north; that, at the time said Bragg was nearing the main line of said defendant, said James Bragg saw said engine and train of cars rapidly approaching from the north, before he, said Bragg, had crossed said main line, and he, said James Bragg, to avoid injury from said engine

and train of cars, stopped, and was standing on the side-track, awaiting the passage of said engine and train; that the defendant carelessly and negligently allowed a car to be cut loose from said train that was approaching on the main line, and by turning the switch, which was located immediately north of said highway, carelessly and negligently threw said car with great force in and on said side-track; that said car so thrown in on said side-track aforesaid caused the cars that were standing in the highway ten feet from the center of the traveled track aforesaid to move rapidly forward across the public highway with great force and momentum, and said cars struck said James Bragg, and cut, bruised, crushed, and mangled said James Bragg and injured him, said James Bragg, from which injuries said James Bragg died; that said cars so thrown onto said side-track were unaccompanied by an agent or servant, or any person, of said railway company, and were thrown in without any signal or warning to said James Bragg, or any other person or persons; that said James Bragg was an able-bodied man at the time of such injuries, and earned \$1.75 per day; that said James Bragg left surviving him a widow and two daughters, now of the ages of seven and nine years, and by reason of the carelessness and negligence of the defendant, and without any fault on the part of said James Bragg, said widow is left without, and deprived of, her husband and support, and said children have been deprived of a father and support, to their damage in the sum of \$20,000."

Appellant's demurrer for want of facts to this complaint was overruled, and this ruling, assigned as error, presents the first question for our consideration.

In the class of cases to which this belongs the plaintiff is required to aver in his complaint such facts as disclose a legal duty owing by the defendant, and a negligent

1. performance or negligent failure in the performance of such duty. *Pittsburgh, etc., R. Co. v. Peck*

(1905), 165 Ind. 537, and cases cited. The facts creating the duty should be alleged with such fullness and certainty as to make plain an obligation of duty, and to indicate its character.

The employes of a railway company are required to exercise ordinary care for the safety of travelers while in the use of grade crossings of a highway and rail-

2. way, but they are only required not to injure willfully trespassers and mere licensees while upon the right of way of the company. Public highways are established and maintained for the use of travelers, and it is manifest that the duty owing by a railway company to a traveler or passer over a grade crossing is very different from that owing to a mere licensee while upon the same crossing.

It is averred in the complaint that the decedent approached the crossing from the east, saw the engine and cars coming, and stopped on the side-track to avoid

3. injury and await the passage of the engine and train. His destination is not stated, nor is it averred that he intended to pass over the crossing at the time of the accident. He may have been drawn toward the crossing by curiosity, and entered upon the right of way intending to turn back or go in a northwardly or in a southerly direction, so far as the averments of the complaint advise us. It is not in terms alleged that he was upon the highway at the time he was injured, but that fact is shown only by inference. It was not essential to show that he was on his way home, or on an errand of business, but it should be shown by proper averment, if true, that he was intending and about to use the crossing as a traveler or passer over and along the public highway. If in point of fact the decedent was, prior to and at the time of the accident, loitering about the crossing, or seeking shelter from the rain under the cars, he would be required to look out for his own safety, and would not be in a position to exact

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of appellant that care which is due to a traveler in the ordinary use of the crossing. In pleading, facts must be directly and positively averred, and the necessary

4. elements to constitute a cause of action will not be supplied by inference and intendment. *Laporte Carriage Co. v. Sullender* (1905), 165 Ind. 290; *Pittsburgh, etc., R. Co. v. Peck* (1905), 165 Ind. 537.

In actions for injuries caused by the defective condition of premises it is necessary to allege by what right the person injured was upon the premises at the time

5. of receiving his injury. *South Bend Iron Works v. Larger* (1894), 11 Ind. App. 367; *Thiele v. McManus* (1891), 3 Ind. App. 132; *Mathews v. Bense* (1888), 51 N. J. L. 30, 16 Atl. 195; *Maenner v. Carroll* (1876), 46 Md. 193.

It is equally essential in cases of this character to show the exact relation between the parties from which the duty declared upon arises. The complaint before us does

6. not show that the decedent was a traveler or passer over the highway crossing at which the injury occurred, and in that ordinary use of the same which entitled him to recover for a personal injury inflicted by the negligence of appellant. It follows that the court erred in overruling appellant's demurrer to the complaint.

The judgment is reversed, with directions to sustain the demurrer to the complaint, and grant leave to amend if desired.

**BEMIS INDIANAPOLIS BAG COMPANY v. KRENTLER,
BY NEXT FRIEND.**

[No. 20,865. Filed January 16, 1907.]

1. TRIAL. — *Verdict.* — *General.* — *Special.* — *Which Controls.* — Where the answers to the interrogatories to the jury are in irreconcilable conflict with the general verdict, such answers control. p. 655.

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2. **TRIAL.**—*Verdict.*—*General.*—*Special.*—*Conflict.*—*How Determined.*—In determining whether there is an irreconcilable conflict between the general verdict and the answers to the interrogatories to the jury, the court will look only to the complaint, answer, general verdict and such interrogatories and answers. p. 655.
3. **MASTER AND SERVANT.**—*Negligence.*—*Factory Act.*—*Printing Presses.*—A printing press is not one of the pieces of machinery specifically designated to be guarded under the provisions of the factory act (Acts 1899, p. 231, §9, §7087i Burns 1901). p. 658.
4. **PLEADING.**—*Complaint.*—*Master and Servant.*—*Factory Act.*—A complaint counting on defendant's violation of the factory act (Acts 1899, p. 231, §9, §7087i Burns 1901) must show that the machine causing the injury was of the class required by such act to be guarded, and that it was possible or practicable to guard such machine. p. 658.
5. **TRIAL.**—*Verdict.*—*General.*—*Special.*—*Conflict.*—*Negligence.*—*Factory Act.*—Where the general verdict is a finding of negligence at the common law only, and the answers to the interrogatories to the jury show negligence only by the violation of the factory act (Acts 1899, p. 231, §9, §7087i Burns 1901), such answers are in irreconcilable conflict with the general verdict, and defendant is entitled to judgment. p. 658.
6. **APPEAL AND ERROR.**—*Reversal.*—*When New Trial Ordered.*—The Supreme Court will order a new trial where justice appears to demand it. p. 659.

From Marion Circuit Court (12,977); *Henry Clay Allen*, Judge.

Action by Tillie Krentler, by her next friend, against the Bemis Indianapolis Bag Company. From a judgment on a verdict for plaintiff for \$15,000, defendant appeals. Transferred from Appellate Court under §1337u Burns 1901, Acts 1901, p. 590. *Reversed.*

Miller, Elam & Fesler and *Chambers, Pickens & Moores*, for appellant.

Groninger & Groninger and *M. A. Ryan*, for appellee.

MONKS, J.—Appellee, by her next friend, brought this action to recover damages for personal injuries received by

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her while in the service of appellant. The jury returned a general verdict in favor of appellee and also answers to interrogatories submitted by the court under §555 Burns 1901, Acts 1897, p. 128.

Appellant's motion for a judgment in its favor on the answers to the interrogatories, notwithstanding the general verdict, and its motion for a new trial were overruled, and judgment was rendered on the general verdict in favor of appellee.

The rulings on the motions mentioned are separately assigned as error. If the answers of the jury to the interrogatories are in irreconcilable conflict with the

1. general verdict the court below erred in overruling appellant's said motion for judgment in its favor.

In determining whether the answers of the jury are in irreconcilable conflict with the general verdict, we can only look to the complaint, answer, the general verdict,

2. the interrogatories and the answers thereto. *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 300.

It is alleged in the complaint "that the Bemis Indianapolis Bag Company, on September 24, 1903, and for a long time before, and at the time of bringing the action, owned and operated a factory in the city of Indianapolis, Indiana, and was engaged in manufacturing bags from paper and cloth, stamping and printing advertising matter thereon; that in its factory it had a large printing machine and press, used for the purpose of printing and stamping advertising matter on paper bags manufactured by the defendant; that said machine or printing-press consisted of a large iron frame, in which were adjusted large iron cylinders, revolving one upon another in a very rapid manner, being propelled by electricity as a motive power; that these cylinders on September 24, 1903, were, and still are, unguarded, and are very dangerous to persons operating the machine or press, as was well known to the defendant for a

long time before the happening of the injury afterward described; that on and before September 24, 1903, plaintiff was in the employ of the defendant, and on that day was ordered by the defendant, through its agent and foreman, under whose direction she was working, and whose direction she was bound to obey, to work upon and operate said machine and press; that the work she was ordered to do, at the time mentioned, was to feed paper bags through and between the cylinders of the machine for the purpose of having printed advertising matter impressed thereon by said machine; that in the performance of her duties she was obliged to stand at the side of the machine, on a platform made for that purpose about eighteen inches from the floor; that she was then a minor less than seventeen years of age, and wholly inexperienced in the use of the machine; that the machine had large iron revolving cylinders operated by electricity, and revolving one upon the other in a very rapid manner, and plaintiff, in working at said machine as ordered, had to stand on the platform facing the table connected with the machine, on which were placed the bags before they were run into the machine, and in the performance of her duties she was obliged to be in close proximity to the revolving cylinders; that in the performance of her work as ordered, on the day mentioned, she guided and fed into the machine, between the rapidly revolving cylinders, paper bags to be printed upon by the machine; that connected with the machine was a table upon which the bags were placed before they were printed, and in the performance of her work she picked up a paper bag off of the pile with her right hand, pushed it down on the table, caught it with her left hand, and guided it into the machine; that as she was performing this work the electric power propelling the machine unexpectedly came on with unusual force, and caused the machine to make a sudden start and to jerk with great force, which caused the pile of bags on the table connected with the

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machine to fall over and strike her left arm, and thereby pushed and caused it to be drawn into the machine and between the rapidly revolving cylinders, causing the injuries complained of; that the defendant negligently permitted the electric power to come on and cause the machine to jerk, and thereby caused the pile of bags to fall down upon plaintiff's left hand and arm; that defendant, in violation of the statute of the State of Indiana, had wholly and negligently failed and refused to guard in any manner the rapidly revolving cylinders of the machine so as to prevent the hands and arm of the person operating it from being drawn into and between the cylinders; that if the machine had been guarded and the entrance to the cylinders guarded the injuries complained of would not have occurred; that plaintiff's left hand and arm were drawn between the cylinders; that this injury was caused solely by the negligence of the defendant in not regulating the electric power used in operating the machine, and in disobeying the statute of the State of Indiana in failing properly to guard the revolving cylinders so as to prevent the plaintiff's arm and hand from being drawn between them while operating the machine."

Appellant insists that the jury by their answers to the interrogatories found "that there was no falling of the bags on appellee's hand, that appellee's hand got into the machine solely because the machine was not guarded, and that the failure properly to guard the machine was the proximate cause of her injury, and that her injury was caused solely by the failure on the part of appellant properly to guard the machine, and that such answers are in irreconcilable conflict with the general verdict."

Appellee contends that the jury, by their answers to interrogatories, found that "the proximate cause of appellee's injuries was the violation of a statutory duty resting upon appellant in not properly guarding the machine in question, and that the falling of the bags was not the proxi-

mate cause of appellee's injury, and that their findings are consistent with the general verdict."

This contention of appellee is on the theory that appellant was required, by said factory act, to guard the printing-press mentioned in the complaint, and that the failure on the part of appellant properly to guard the same, as required by said act, was the proximate cause of her injury.

The printing-press mentioned in the complaint is not one of the particularly enumerated or designated pieces of machinery or appliances required by the factory

3. act (§7087i Burns 1901, Acts 1899, p. 231, §9) to be properly guarded, and as there are no facts alleged in the complaint showing that said printing machine is of the class of machinery required by said act to be guarded, we hold upon the authority of *Laporte*

4. *Carriage Co. v. Sullender* (1905), 165 Ind. 290, that the complaint does not state a cause of action under said factory act, for the reason that it is not shown that any duty rested upon appellant under said act to guard said printing-press. Moreover, as was said in the last case cited, at page 303: "There is also an entire absence of facts to disclose whether it is possible or practicable properly to guard this particular machine without rendering it useless for the purpose for which it is intended to be operated."

Whether the complaint states a cause of action in favor of appellee at common law, we need not determine.

The general verdict found that appellee was entitled to recover at common law, while the answers of the jury to the interrogatories found that the sole and proximate

5. cause of appellee's injury was appellant's violation of a statutory duty to guard the printing-press mentioned in the complaint. This finding is in such conflict with the general verdict that it cannot be reconciled or removed by any evidence admissible under the issues in

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the cause, and is therefore in irreconcilable conflict with said general verdict. It follows that the court erred in overruling said motion of appellant for judgment in its favor on the answers to the interrogatories. Other questions are discussed in the briefs, but the conclusion we have reached renders their determination unnecessary.

The judgment is reversed, and upon the authority of *Farmers, etc., Ins. Assn. v. Stewart* (1906), *ante*, 544, and the cases cited, the trial court is instructed to

6. grant appellant a new trial, with leave to appellee to amend the complaint, if desired, and for further proceedings not inconsistent with this opinion.

GLENS FALLS INSURANCE COMPANY v. MICHAEL
ET AL.

[No. 20,432. Filed June 8, 1905. Dissenting opinion filed June 28, 1905. Rehearing denied January 17, 1907.]

1. **INSURANCE.—Marine.—Disclosures.**—It is the duty of the insured, in a marine policy, to disclose to his insurer all facts within his knowledge which would tend to increase the hazard, and a failure so to do ordinarily avoids such policy. p. 665.
2. **SAME.—Fire.—Disclosures.**—It is not the duty of assured, in a fire policy, to make disclosures as to the risk, there being no fraud practiced, since the insurer may examine the property insured and can make and verify inquiries in reference to such risk. p. 666.
3. **SAME.—Policies.—Construction.—Contracts.**—Insurance policies which contain inconsistent provisions, or which are so framed as to be fairly open to construction, will be construed so as to sustain, rather than defeat, the insurance. p. 666.
4. **SAME.—Fire Policies.—Void Clauses.—Representations.**—In the absence of fraud, a fire policy which provides that it "shall be void if the insured has concealed * * * any material fact; * * * or if the interest of the insured in the property be not truly stated herein," or "if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple," is not void, although assured had a life estate

only, no representations having been made by assured to the insurer and no questions being asked by such insurer. Anything to the contrary in *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, disapproved. Gillett, J., dissenting. pp. 666, 699, 705.

5. **INSURANCE.—Policies.—Construction.—Inequality of Parties.**—Insurance policies prepared by experts with a view of safeguarding the insurer at all points, and with the execution and provisions of which the assured had nothing to do, and the import of many of the provisions of which he cannot fully comprehend, should not be construed and enforced as contracts where the parties deal on an equal footing with each other. p. 677.
6. **SAME.—Policies.—Mutuality of Contracts.**—The meeting of the minds of the parties, essential to the ordinary contract, is usually wanting in fact as to many of the provisions in insurance policies, the assured's assent thereto being largely a legal fiction. pp. 677, 704.
7. **SAME.—Fire.—Insurable Interest.—Life Tenants.**—Life tenants have an insurable interest in the house situate upon their land. p. 677.
8. **SAME.—Policies.—Validity.—Presumptions.**—Where the insurer issues a fire policy to life tenants, and they pay the premium and the insurer accepts and retains same, the presumption is that the parties in good faith intended to effect a valid contract. p. 677.
9. **SAME.—Policies.—Title of Assured.—Failure to Inquire About.—Presumptions.**—Where the insurer issues a fire policy to life tenants without inquiring as to the title, the presumption is that the insurer is satisfied as to the condition of the title and voluntarily issues the policy regardless thereof. p. 678.
10. **SAME.—Policies.—Provisions Broken.—Waiver.**—A provision in a fire policy which is violated to the insurer's knowledge at the taking effect of such policy, is waived. p. 678.
11. **SAME.—Policies.—"Void" Clauses.—Voidable.**—The word "void" as used in clauses in an insurance policy means voidable at the election of the insurance company. p. 678.
12. **SAME.—Policies.—Void.—Effect.**—A void insurance policy is binding on nobody. p. 678.
13. **SAME.—Policies.—Voidable.—Avoidance of.—Election.**—An insurer, acting with reasonable diligence, has the right to avoid its policy for a condition broken, or it may elect to continue such policy in force, regardless thereof. p. 678.
14. **SAME.—Policies.—Breach of Condition.—Election.**—Where a fire policy provided that it should be void in case the assured

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had other than a fee-simple title to the land on which the insured building stood, and the assured had a life estate only, it was the insurer's duty upon discovery of that fact to make its election whether it would avoid such policy or continue it in force. p. 679.

15. **INSURANCE.**—*Policies.*—*Avoidance.*—*Election.*—*Notice.*—*Return of Premium.*—Where an insurance company learns of a condition broken in its policy, it must, with reasonable promptness after learning of the breach, notify the assured of such avoidance and the reasons therefor and return to him the unearned premium. p. 679.
16. **PLEADING.**—*Answer.*—*Insurance Policies.*—*Avoidance.*—*Election.*—An answer in avoidance of an insurance policy, because of a condition broken, must set out such condition, a breach thereof by assured and the acts done by the insurer in pursuance of its election to avoid such policy. p. 679.
17. **INSURANCE.**—*Policies.*—*Voidable.*—*Retention of Premium.*—The retention of the premium paid for an insurance policy, with knowledge of a condition broken, is an election to treat such policy as valid and not to insist upon a forfeiture. p. 679.
18. **PLEADING.**—*Insufficient Answer.*—*Reply.*—*Demurrer.*—*Carrying Back.*—A demurrer to a reply will be carried back and sustained to an insufficient answer. p. 680.
19. **APPEAL AND ERROR.**—*Stare Decisis.*—*Conflict.*—Where the authorities on a question of law are conflicting, the Supreme Court will adopt the rule which seems the most fair, reasonable and just. p. 699.
20. **INSURANCE.**—*Fire.*—*Life Tenants.*—*Measure of Loss.*—The measure of loss suffered by life tenants in the destruction of their house, covered by a fire policy, is the value of the insured property when tested by such interest. p. 703.
21. **SAME.**—*Conduct.*—*Notice.*—*Waiver.*—An insurance company is chargeable with notice of its own conduct, and a waiver can be manifested by conduct as well as by words. p. 704.
22. **SAME.**—*Voidable.*—*Premiums.*—*Recovery.*—The premium paid for a voidable insurance policy cannot be recovered by the assured, the right of avoiding such policy resting solely with such company. p. 704.

From Cass Circuit Court; *John S. Lairy*, Judge.

Action by George W. Michael and another against the Glens Falls Insurance Company. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate

Court under §1337u Burns 1901, Acts 1901, p. 590. *Affirmed.*

Royal J. Whitlock, Charles E. Yarlott and Chambers, Pickens, Moores & Davidson, for appellant.

Lairy & Mahoney and McConnell, Jenkines, Jenkines & Stuart, for appellees.

MONTGOMERY, J.—This action was brought by appellees upon a policy of insurance against loss by fire. The policy contained the following, among other provisions:

“This entire policy shall be void if the insured has concealed, or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured, touching any matter relating to this insurance, or the subject thereof, whether before or after the loss; this entire policy, unless otherwise provided by agreement, indorsed hereon and added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple.”

Appellant answered the complaint in six paragraphs, the first, second and sixth of which were afterwards, by agreement, withdrawn. The third paragraph of answer alleged that “at the time said policy under which plaintiffs’ claim was issued, and at the time of said loss and damage by fire, the interest of the plaintiffs in the buildings, additions, and appurtenances mentioned in said policy of insurance, and for loss and damage of which, by fire, the plaintiffs have brought this action, was not that of sole and unconditional ownership, and said building and its additions and appurtenances were not, at the time of the issuance of said policy, and were not at the time of said loss and damage by fire, on ground owned by the plaintiffs or either of them in fee simple; and therefore said policy of

insurance, so issued to them, was and is, by the provisions of the contract in the complaint mentioned and set out, void." The fourth paragraph alleged, in substance, that although it was not so provided by agreement indorsed on or added to the policy, yet the subject of insurance was, at the time of issuing the policy and of the fire, a building on ground not owned by assured in fee simple, but that at said times the plaintiffs' interest in said premises was that of life tenants only, and the fee was in other persons named. The fifth paragraph alleged that, although it was not so provided by agreement indorsed on or added to the policy, nevertheless, at the time of issuing said policy, and at the time of said fire, the interest of plaintiffs in the subject of insurance was not that of unconditional or sole ownership, but was that of life tenants only; the remainder in fee in and to the subject of insurance being at said times vested in other persons named.

Appellees replied to the third paragraph of answer herein set out, admitting that at the time of the issuance of the policy, and of the loss and damage by fire sued for, their interest in the buildings mentioned in the policy of insurance was not that of unconditional ownership, and that said buildings were not at the time on grounds owned by them or either of them in fee simple, but they averred "that no change had taken place in the condition of the title to said property, described in the policy sued on, since said policy was issued; that the plaintiffs were then and are now the owners of a life estate in said real estate, with the remainder in fee to Herbert S. Michael, George Michael, and Morris S. Michael, their children; that no written application was made by plaintiffs or either of them for the policy of insurance sued on, and no representations of any character as to the state of said title were made by these plaintiffs or either of them; that at no time before the issuing of said policy or since that time, up until the date of the loss, was anything concerning the state of said title

asked of said plaintiffs or either of them by the agent of the defendant who wrote said policy; that the attention of neither of the plaintiffs was called to the conditions in the policy sued on in reference to title, and plaintiffs had no knowledge of said condition in said policy, or that the defendant considered the state or condition of plaintiffs' title to the property insured material to the risk, or that anything in the condition of plaintiffs' title might or could work a forfeiture of said policy; that the defendant, without making any inquiry of plaintiffs concerning the condition of said title, issued said policy, and accepted and retained the premium therefor from the plaintiffs, and that said defendant never thereafter made any objection to the condition of said title until after the loss by fire had occurred; that the plaintiffs accepted said policy and paid the premium therefor in the full belief that the same was a valid and binding contract of insurance, covering the property described therein. Wherefore plaintiffs aver that the defendant has waived any defense to said policy by reason of the condition of said title, and they pray for judgment accordingly." Appellees' reply to the fourth paragraph and also to the fifth paragraph of answer was substantially the same as the reply to the third paragraph of answer, above set out.

Appellant demurred to each of the replies for want of sufficient facts.

It was thereupon agreed by the parties to this action, and the agreement made a matter of record, that all questions not presented by these pleadings should be waived, and the cause submitted to the court upon the issue of law presented by appellant's demurrer to each of the replies, and that, in case the court should hold the replies sufficient to avoid the several paragraphs of answer to which they were addressed, judgment was to be rendered in favor of appellees for \$917.86, together with interest after March 1, 1903, and, in case the court should hold the replies in-

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sufficient, judgment should be rendered in favor of appellant for costs. But nothing in the agreement was intended to preclude either party from appealing or otherwise obtaining a review of the decision of the circuit court in like manner as they might do without having entered into such stipulation. The court subsequently overruled appellant's demurrer to each of said paragraphs of reply, to which rulings the appellant duly excepted, and thereupon judgment was rendered in accordance with said agreement in favor of appellees for \$932.40, together with costs. The assignment of errors calls in question the decision of the court on appellant's demurrer to each of said paragraphs of reply.

The contention of appellant is that appellees are bound by the strict terms of the policy with regard to title, and that it was their duty to make known, voluntarily,

1. the exact state of the title to the grounds upon which the insured building stood, and to see that the same was correctly described, and that a failure to do so rendered the policy absolutely void. This contention is primarily founded upon a principle which prevails in marine insurance. The subject of marine insurance is often in distant ports or upon the high seas, and generally not open to the examination of the underwriter. The perils to which such property may be exposed are peculiarly numerous, hazardous, and difficult to anticipate by any reasonable inquiry, but are always known to the owner of the property. The underwriter is compelled, from necessity, to rely upon the assured, for a full disclosure of all facts known to him which may in any way affect the risk to be assumed. It is both reasonable and just, under such circumstances, that the assured should not only act with unquestioned good faith, but also make known every fact and circumstance within his knowledge which might increase the hazard of insurance, and, in case of failure so to do, liability upon the policy should be avoided.

It is apparent that there is a marked difference in this respect between the subjects of marine and fire insurance.

The subjects of fire insurance may almost always be

2. seen and inspected, and, if the underwriter assumes the risk without taking the trouble either to examine or inquire about facts which may affect the hazard of insurance, he ought not to complain, in the absence of fraud, if the risk proves to be greater than he anticipated.

A pertinent general rule of law applicable to the construction of these contracts is, "that if policies of insurance contain inconsistent provisions, or are so framed as

3. to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract." *McMaster v. New York Life Ins. Co.* (1901), 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64. See, also, *Thompson v. Phenix Ins. Co.* (1890), 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *First Nat. Bank v. Hartford Fire Ins. Co.* (1878), 95 U. S. 673, 24 L. Ed. 563.

The courts of many states have construed policies having provisions identical with or similar to those of the policy in suit. The importance of the principle involved,

4. and a desire that the reasoning and authority upon which our conclusion rests may more fully appear, have prompted us to quote extensively from these cases. In the case of *Morotock Ins. Co. v. Rodefer Bros.* (1896), 92 Va. 747, 24 S. E. 393, 53 Am. St. 848, the court pertinently said: "Applicants for insurance are not generally aware of the necessity of disclosures which long experience in the business of insurance has shown to underwriters to be necessary, or what disclosures it is important to make; while insurance companies cannot only protect themselves by making inquiries in regard to such things as they may regard to be material, but, as is well known, are in the habit of doing so. * * * If an insurance company elects to issue its policy without an application or any repre-

sensation in regard to the title to the property upon which the insurance is effected, the company cannot complain, after a loss has ensued, that the interest of the insured was not correctly stated in the policy, or that an existing encumbrance was not disclosed." The same court in the case of *Manhattan Fire Ins. Co. v. Weill & Ullman* (1877), 28 Gratt. (Va.) 389, 26 Am. Rep. 364, held that although it was provided in the policy that in case of any omission to make known every fact material to the risk, or if the interest of the assured in the property be not truly stated in the policy it should be void; yet, an omission to disclose, in the absence of any inquiry, an encumbrance in the form of a deed of trust subsisting on the property at the time the insurance was effected, did not vitiate the policy. In the case of *Philadelphia Tool Co. v. British, etc., Assur. Co.* (1890), 132 Pa. St. 236, 19 Atl. 77, 19 Am. St. 596, the court said, that the defense rested upon "one of the almost innumerable conditions, stipulations, and provisos which appear on the policy, and which asserts that if the assured is not the sole and unconditional owner of the property, or if the building stands on ground not owned in fee simple by the assured, or if the interest of the assured is not truly stated in the policy, then the policy shall be void." In discussing the defense thus asserted the court said: "Is this condition applicable to the case presented on this policy? A policy of insurance, like any other contract, is to be read in the light of the circumstances that surround it. This policy was issued without any application or written request describing the interest of the assured in the buildings. No actual representation of any sort upon the subject, oral or written, is alleged to have been made by or on behalf of the assured. We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer, and intended to cover in good faith the interest which the insured had in the buildings. Fraud is never to be presumed, and in this case no fraudulent representa-

tion is shown or alleged, unless it can be deduced from the statements of the insurer, made, as we must presume, on the knowledge of its representative, and for which the insured is in no manner responsible. We must also remember that this policy is to be interpreted most strongly against the company whose contract it is. Applying these principles to the question now raised, we conclude that the policy, written on the knowledge of the insurer, was made in view of the facts of the case, and was intended to cover such interest in the buildings as the insured had. This was a leasehold only, but it was an insurable interest. Presumably it is the interest which an application, if one had been made, would have shown, for it is the only interest which the tool company ever had or claimed to have. To such an interest, the proviso whose protection is invoked is not applicable."

From the case of *Western, etc., Pipe-Lines v. Home Ins. Co.* (1891), 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. 703, we quote the following pertinent declarations: "It is not even pretended that there was any fraudulent concealment of ownership of the property, or that any untruthful representation was made, upon the faith of which the policy was issued; nor is it claimed that the defendant company was not fully aware of the exact situation and ownership of the oil when it accepted the risk. * * * The policy in suit was issued without any application or written request describing the interest of the insured in the oil, and it does not appear that any actual representation of any kind was made by the insured. * * * The defendant having insured the oil contained in tank No. 1, without any representation as to the *quantum* of plaintiff's interest therein, must be considered as having insured it as against any loss which the plaintiff would suffer by fire." In the case of *Short v. Home Ins. Co.* (1882), 90 N. Y. 16, 43 Am. Rep. 138, a somewhat similar question was involved, and upon that point the court said: "It is held that a

neglect on the part of the insured to make known the fact that a building is unoccupied is not a breach of a condition in the policy avoiding it in case of any omission to make known every fact material to the risk; that the applicant has a right to suppose that the insurer will make proper inquiries, and that in making inquiries as to material facts he considers all others as immaterial, or assumes to know or waives information in regard to them; that when he fails to inquire as to occupation, unless there is proof of concealment, it is not evidence of bad faith which will vitiate the policy, and that where no statement is made in the policy as to the occupation, it must be assumed that the insurance is made without regard to occupation." The case of *Hoose v. Prescott Ins. Co.* (1890), 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340, is aptly in point upon the subject under consideration. In that case the court said: "But the defendant relies upon the further provision contained under this head, to the effect that 'this entire policy, and every part thereof, shall become void unless consent in writing is indorsed by the company hereon in each of the following instances,' namely: (1) If the assured is not the sole and unconditional owner of the property. (2) If any building intended to be insured stands on ground not owned in fee simple by the assured. (3) If the interest of the assured in the property, whether as owner or otherwise, is not truly stated in the policy. (4) If any change take place in the title, interest, location, or possession of the property, by sale, transfer or conveyance, in whole or in part. In construing this portion of the policy, the whole must be taken together. Now, the object sought to be accomplished by the person applying for insurance was to obtain indemnity against loss by fire of her interest in the building. If the insurance company which made out this policy upon the verbal application to its agent had desired to know what interest it was insuring, it should have stated it in that part of the policy pertaining

to the risk. It was the intention of these parties to issue a valid and binding contract of insurance, valid and binding from the time of acceptance of the same by the assured, not that after it had been accepted by the assured then the assured should apply to the company and obtain its consent in writing indorsed on the policy, stating that the assured was not the sole and unconditional owner of the property, or stating that the building intended to be insured stood on ground not owned in fee simple by the assured, or stating by indorsement on the policy the interest which the assured had in the property covered by the insurance; and yet the language of this part of the policy is that the entire policy, and every part thereof, shall become void, that is, void in the future, unless such consent in writing is indorsed by the company in writing thereon. To give any reasonable force and effect to this clause of the policy, it can only be held to apply to such changes as arise after the policy has been delivered and accepted, in the ownership of the property, or, if a building stood upon leased ground, the ownership of the building, and it does not apply to an existing state or condition of the property at the time the policy was issued. It looks to the future for protection of the insurer, and not to the present, only in so far as the preceding portion of the policy is violated by a misstatement or concealment of any fact material to the risk. Construing this portion of the policy with the testimony in the case, and with the fact that the company issued the policy to Mrs. Hoose, without stating in the policy what her interest was, but insuring the building against loss by fire to an amount not exceeding the interest of the assured in the property, we think that it must be held that the defendant understood the condition of the title, and intended to insure whatever interest Mrs. Hoose had which was insurable, not exceeding the amount named in the policy. We do not think that it would carry out the intention of the parties, or be a fair and just construction of this instru-

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ment, to hold that when it was issued and accepted by the assured, and the premium paid, it was void from that moment because it did not contain the indorsements required above." See, also, to the same effect, *Hall v. Niagara Fire Ins. Co.* (1892), 93 Mich. 184, 189, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. 497.

In *Miotke v. Milwaukee, etc., Ins. Co.* (1897), 113 Mich. 166, 71 N. W. 463, the court said: "The day has gone by in Michigan for successfully contending that the mere acceptance of a policy containing a condition like this makes it conclusive against the holder who accepts it in ignorance of the clause, and whose title does not conform to the strict letter of the condition." In the case of *Lycoming Fire Ins. Co. v. Jackson* (1876), 83 Ill. 302, 25 Am. Rep. 386, it is said in the syllabus: "The principal thing in an insurance is, that the assured has an insurable interest, and has acted in good faith. Under a statement that he is the owner, he is only bound to prove an insurable interest, which is such a title as, if there should be a loss, without insurance, it would fall upon him." In *Manchester Fire Assur. Co. v. Abrams* (1898), 89 Fed. 932, 32 C. C. A. 426, Gilbert, circuit judge, speaking for the court, said of the contention that the assured, by accepting a policy of insurance containing the stipulation that the same shall be void if the ownership of the assured is not unconditional and sole, has falsely represented to the insurance company that his ownership is sole and unconditional: "But sound reason as well as the weight of authority inclines us to the view that where the assured has an insurable interest in the property, and in good faith applies for insurance upon the same, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest, and issues a policy to him, and accepts and retains his premium, the company must be presumed to have knowledge of the condition of his title, and to

assure the property with such knowledge." The same doctrine is declared in the case of *Morrison v. Tennessee, etc., Ins. Co.* (1853), 18 Mo. 262, 59 Am. Dec. 299, in the following words: "The rights of the insurer are sufficiently guarded, by having it in his power to exact, by inquiry, a description of the interest of the applicant, and by the recovery being limited in case of loss to the value of the interest proved on the trial. * * * These views commend themselves to our judgment by their justness, and we are satisfied will effect more solid justice between the assured and the insurer than the contrary doctrine. * * * The man without guile, who asks for insurance on his property, is not aware of the necessity of disclosures, which long experience in insurance offices has shown to the underwriter to be necessary, and to hold his policy void for not making disclosures of the importance of which he is not aware, would be gross injustice." The holding of the supreme court of Nebraska is to the same effect. We quote the following from the case of *Hanover Fire Ins. Co. v. Bohn* (1896), 48 Neb. 743, 67 N. W. 774, 58 Am. St. 719: "Where an application for fire insurance is oral, and no inquiries are made by the agent of the insurer as to the condition of the title to the property, and the insured says nothing about the existence of a mortgage thereon, but does not keep silent from any sinister motive or with the intention on his part to deceive or mislead the insurer, then the fact that when the policy was issued there existed a mortgage upon the insured property will not invalidate the policy, notwithstanding the fact that the policy provides that it should be void if there existed an incumbrance, by mortgage or otherwise, against the insured property. *Insurance Co., etc., v. Bachler* [1895], 44 Neb. 549, 62 N. W. 911. But it is insisted that the policy sued upon was never in force because the Bohns at the date of its issuance were not the unconditional and sole owners of the insured property, and that the insured building was not

situated on ground to which the Bohns had a fee-simple title. This contention involves the assumption that the Bohns at the date of the issuance of the policy in suit had no insurable interest in the insured property. * * * It has already been stated * * * that no questions as to the title of the Bohns were ever propounded to them by the fire insurance companies or their agents; that neither of the Bohns ever made any representations to the fire insurance companies as to what title they had or held; that the Bohns were not actuated by any sinister motives whatever in not disclosing the nature of the interest they had in the insured property; that no fraud was attempted by any one, and that the failure of the Bohns in September, 1890, to disclose the exact nature of their interest in the insured property resulted either from their not thinking about it, or from the failure of the fire insurance companies to inquire about that interest. Under these facts we think the policy, notwithstanding its provisions, was in force even in favor of the Bohns at the time the loss sued for occurred." See, also, *Phenix Ins. Co. v. Fuller* (1898), 53 Neb. 811, 74 N. W. 269, 68 Am. St. 637, 40 L. R. A. 408.

In the case of *German Ins., etc., Inst. v. Kline* (1895), 44 Neb. 395, 62 N. W. 857, the court, upon this point, said: "The real contract of insurance is made before the policy is written, and the insured, by accepting the policy with such a condition as the one relied upon, cannot be deemed to have represented his title to be in fee simple, or not by leasehold. How can it be said that, under such circumstances, there has been either fraud, misrepresentation, or concealment on the part of the insured? He has represented nothing. He has not been asked to represent anything." In *Quarrier v. Peabody Ins. Co.* (1877), 10 W. Va. 507, 27 Am. Rep. 582, which was an action upon a policy providing that if the interest of the insured is not truly stated, or is other than the entire, unconditional, and

sole ownership, it must be so expressed in the policy, under penalty of forfeiture, it was held, that the policy was not rendered void by the failure to disclose that at the time the policy was issued there was a deed of trust on the property insured, no inquiry having been made about the state of the title. To the same effect is *Queen Ins. Co. v. Kline* (1895), (Ky.), 32 S. W. 214.

The supreme court of Montana, in the case of *Wright v. Fire Ins. Co.* (1892), 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211, in a well-reasoned opinion, held that where an insurance company issued a policy on mortgaged property, without making inquiry as to whether the property was mortgaged, which fact was a matter of public record, and no representations touching the matter were made by the insured, who paid the premium and accepted the policy in ignorance of the fact that it contained a provision rendering it void if the property be or become mortgaged, unless consent in writing was indorsed by the company thereon, the company should be held by its action to have consented to take the risk on the mortgaged property, as effectually as if consent had been indorsed on the policy. In the case of *Georgia Home Ins. Co. v. Holmes* (1897), 75 Miss. 390, 23 South. 183, 65 Am. St. 611, it is said: "This is a case, then, in which no application—no formal application—was made, because the agent held it unnecessary, inasmuch as he knew about the condition of the property, and a case in which appellee did not know there was any anti-mortgage clause contained in the policy until after loss, and the question is whether the company shall now be permitted to repudiate its contract made, not upon any misrepresentations, or even representations, of the insured, but upon its own knowledge of the property. If this policy was issued upon the knowledge of the company as to the condition of the property, and after refusal to furnish the usual blank application, whereby the insured would have apprised the insurer of the true condition of the property, and not upon any representations of the insured, then the

anti-mortgage clause must be held to have been waived. Any other view would involve the holding by us of this proposition: That the insurance company, waiving any application by the person desiring insurance, and issuing a policy upon its own knowledge of the condition of the property, may receive the premiums paid for the indemnity, and defeat a recovery for a loss sustained by inserting in the policy a provision invalidating the contract from the moment it was signed and delivered, thus inducing the insured to rest upon a contract which the company never intended to carry out. This cannot be sound law." In *Sharp v. Scottish Union, etc., Ins. Co.* (1902), 136 Cal. 542, 69 Pac. 253, 615, it is held that where there was no fraud, false swearing, concealment, or misrepresentation by the applicant for a policy of fire insurance which made the loss payable to a mortgagee, and where the assured person had an insurable interest in the property, though his wife was the owner of an undivided half interest therein, the policy may be enforced by the mortgagee, notwithstanding a clause that if the interest of the insured be other than unconditional and sole ownership the policy shall be void, and that in such case the company must be presumed to have issued the policy with knowledge of the condition of the title, which was not inquired into, and to have assured the property with such knowledge, and to have waived all inconsistent provisions. In the case of *Dooly v. Hanover Fire Ins. Co.* (1896), 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26, the provisions of the policy were the same as those now under consideration, and were pleaded in defense of the action. In disposing of them the court said: "There having been no written application in which questions were asked and answered concerning the status of the property, we think, under the authorities and as a question of right, that this condition which is injected into the policy, among numerous other conditions more or less technical and hard to understand by the ordinary mind,

ought not to prevent a recovery, in the absence of any misrepresentation on the part of the insured. The insured, as a matter of fact, ordinarily knows nothing about the policy until it is made out and returned to him after the payments for the same have been made to the agent at the time the contract was made, and the insurer, having failed to obtain this information, must be held to have done so at his peril." In *Lancaster Ins. Co. v. Monroe* (1897), 19 Ky. Law 204, 39 S. W. 434, it is said: "The case here, therefore, is one where, without inquiry as to any mortgage, the company accepts the money of the insured, prepares its own policy and issues it. It seems to us that the insured has the right to assume that the company has made inquiries of him, touching every material fact affecting the risk, and if he does not scrutinize the multitude of conditions and stipulations with which he finds his policy shingled over he only risks the avoidance of his policy if it turns out that he has failed to disclose what is in fact material and what he ought to have known to be material to the risk assumed by the company. We think this is the effect of the later decisions of this court, as is certainly the trend of the authorities generally." *Hartford Fire Ins. Co. v. McClain* (1905), (Ky.), 85 S. W. 699. See, also, 1 Wood, Insurance (2d ed.), §212, p. 517; 1 May, Insurance (4th ed.), §207; *Vankirk v. Citizens Ins. Co.* (1891), 79 Wis. 627, 48 N. W. 798. In *German Mut. Ins. Co. v. Niewedde* (1895), 11 Ind. App. 624, the court said: "The weight of authority and the strong equities of the case lead us to hold that where there is no written application, no questions asked, no statements made and no knowledge by the assured that the existence of the mortgage was fatal to his insurance, the company must be deemed to have waived the provisions for forfeiture by reason of the existing incumbrance."

These quotations express the doctrine which meets our approval, and indicate the correct construction of the pol-

icy in suit. We cannot with any regard for justice,

5. strictly apply to this class of written instruments the rule for the interpretation of written contracts generally. The making of contracts is generally preceded by some negotiations, culminating in a meeting of the minds upon terms, mutually agreeable and understood, which are then reduced to writing, and the agreement formally executed. Insurance policies are prepared in advance by insurance and legal experts, having in view primarily the safeguarding of the interests of the insurer against every possible contingency. The insurer not only fully knows the contents of the writing, but also adequately comprehends its legal effect. The insured has no voice in fixing or framing the terms of his policy, but must accept it as prepared and tendered, usually without any knowledge of its contents, and often without ability to comprehend the legal significance of its provisions. The meeting of the minds ordinarily deemed essential to a valid
6. contract, as to many of its terms and conditions, is wanting in fact, and a mere fiction of law.

In this case appellees were not the owners of a fee-simple title to the real estate on which the insured buildings stood, but owned only a life estate therein.

7. They had an insurable interest in the property at the time the policy was issued and at the time of the loss by fire. They desired, in good faith, to obtain insurance upon their interest in the property, and were guilty of no misrepresentation, concealment, or fraud. They were ignorant of the invalidating provisions of the policy, and of the materiality of their exact title to the risk assumed. No change was subsequently made in the title held, nor was any act done increasing the risk of insurance.

It is not suggested that the value of their title was

8. not equal to the amount of insurance carried, nor that the fire would not have occurred just as it did, had their title been an unconditional fee simple. They

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paid the premium charges, which appellant accepted and retains, and honestly rested in the belief that they had valid insurance. We must assume that both parties in good faith intended to effect a valid contract, and, if reasonably possible, so construe the policy as to make it effective. The appellant did not require of appel-

9. lees a written application for insurance, or ask of them any questions concerning the property to be insured, or concerning their title to the same. We must therefore presume that appellant or its agent had satisfactory knowledge of the condition and surroundings of the property, and of the title to the same as then existing.

Knowledge of the true state of the title on the part
10. of the insurer being, under the circumstances shown, presumed by law, the provisions of the policy with respect to title pleaded in the answers were waived. It follows that the policy was valid, at least to the extent of the interest of the insured, and that the facts set out in each paragraph of reply were sufficient to avoid the paragraph of answer to which the same was addressed.

The same result is obtained, and the replies upheld by another course of reasoning. In our opinion the
11. word "void" is used in the policy in the sense of voidable. *Hunt v. State Ins. Co.* (1902), 66 Neb. 121, 92 N. W. 921, and cases cited.

If a title to the property insured, other than a sole and unconditional fee simple in the insured, *ipso facto*, rendered the policy void, then it was void as to both

12. parties. It will scarcely be insisted by any one that the insured, at their option, might have treated the policy as void, and recovered the premium paid, prior to the fire; but the evident meaning of the policy was that, for a breach of its terms, the insurer, acting with

13. reasonable diligence, at its option might avoid the contract. If appellant could elect to avoid the policy for any reason, it is equally clear that in a case like

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this, where the insured had an insurable interest, it could elect not to do so, and treat the policy as valid. If the stipulations with regard to title made the contract

14. voidable only, then, upon discovery of the true condition of the title, whether before or after the loss, the insurer was required to make its election either to regard the contract as valid or void. A court cannot by its fiat alone render a voidable contract void, but it can only adjudge that the party entitled to avoid it has done so, and that it thereby and for that reason became invalid. If

appellant desired to avoid this policy for the reasons
15. sons pleaded, it was required to act with reasonable promptness after acquiring knowledge of the facts, and thereupon it was its duty to notify appellee of its decision to avoid the policy and of the reasons therefor, and to return, or tender, or in some appropriate way manifest its willingness and readiness to restore, the unearned premium received. The answers filed do not disclose the

time when appellant learned the true state of appellees' title, nor deny knowledge of the same at
16. the time of issuing the policy, but proceed upon the theory that the policy was void *ab initio*, and without any action on the part of the insurer. This theory was wrong, and the averment of facts insufficient. The answers should have pleaded the covenants or conditions relied upon, a breach, and the acts done by appellant in pursuance of its election to avoid the contract.

Appellant's contention is that, under the terms of the policy, no risk attached and no liability was assumed by it at any time. It must therefore follow that there

17. was no consideration for the premium received, and good faith and common fairness required its prompt return; and the insurer, by retaining such premium with full knowledge of the facts, elected not to insist upon a forfeiture of the policy. *Hanover Fire Ins. Co. v. Bohn* (1896), 48 Neb. 743, 67 N. W. 774, 58 Am. St. 719;

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Queen Ins. Co. v. Young (1888), 86 Ala. 424, 5 South. 116, 11 Am. St. 51; *German Ins. Co. v. Shader* (1903), 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918; *Fraser v. Aetna Life Ins. Co.* (1902), 114 Wis. 510, 524, 90 N. W. 476; *Sharp v. Scottish Union, etc., Ins. Co.* (1902), 136 Cal. 542, 69 Pac. 253, 254; *Pearlstine v. Westchester Fire Ins. Co.* (1904), 70 S. C. 75, 49 S. E. 4; *Harris v. Equitable Life Assur. Soc.* (1876), 64 N. Y. 196; *Slobodisky v. Phenix Ins. Co.* (1898), 53 Neb. 816, 74 N. W. 270; *McQuillan v. Mutual, etc., Life Assn.* (1902), 112 Wis. 665, 87 N. W. 1069, 56 L. R. A. 233, 88 Am. St. 986; *Schreiber v. German-American, etc., Ins. Co.* (1890), 43 Minn. 367, 45 N. W. 708; *Union Cent. Life Ins. Co. v. Jones* (1897), 17 Ind. App. 592.

We are of the opinion, for the reasons indicated, that the answers were insufficient, and that appel-

18. lant's demurrers to the several paragraphs of reply should have been carried back and sustained to the answers.

No reversible error being shown, the judgment is affirmed.

Gillett, J., dissents.

DISSENTING OPINION.

GILLETT, J.—Impressed as I am with the view that my brethren err in disregarding the condition as to ownership and title which is found in the policy in suit, the task is devolved upon me of stating the grounds of my opinion.

The condition referred to is in the following language:

“This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple.”

And this is not all. Immediately preceding the attesting clause of the policy is the following:

“This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto.”

No preliminary application is required under the terms of the policy.

It is to be observed that the clause first quoted is so plain as not to admit of construction. The policy is void, it asserts, if certain conditions as to ownership and title do not exist, unless by agreement indorsed on or added to the policy it is provided otherwise.

The majority opinion, while it speaks in a prefatory way of the rule that insurance policies are construed most strongly against the company, does not pretend to construe said words. On the contrary, the whole effort is to escape their force. While I should be prepared to sanction the proposition that any fair doubt as to the construction of the contract should be solved against the insurer, yet it is plain that where room to doubt concerning the meaning of the condition does not exist, and where there is no element of illegality or fraud present, the court should not undertake to strip the company's undertaking of a vital condition, and then enforce the promise, on the poor excuse that the property owner failed to read the contract. If there was no meeting of the minds, the court ought not to undertake to supply so vital an element. It is true that the forms of insurance policies are prepared by experts, and that it is the habit of the careless not to read the conditions which are made to underlie the undertakings of such companies, but if a reason for the breaking down of the limitation in question can be extracted from these circumstances, I do not know what limitation of liability exists in life or fire insurance contracts, or in the contracts of the great corporations generally which issue limited liability under-

takings in serving the public, that could not be brushed aside by the courts, where the failure to read the writing resulted in a hardship which might otherwise have been avoided.

It was said by one of the great writers of legal literature: "It is likewise a general and most inflexible rule, that wherever written instruments are appointed, either by the requirement of law or by the compact of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy: of principle, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence; of policy, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence." Starkie, Evidence (10th Am. ed.), *648.

While the rule of *contra proferentem* ordinarily seems to be applied in all of its vigor in construing insurance contracts, yet I am not aware of any well-considered case which countenances the idea that a party may be relieved upon so unwarranted an excuse as the one which the appellees in this case asserted. In *Wierengo v. American Fire Ins. Co.* (1894), 98 Mich. 621, 626, 57 N. W. 833, it was said: "In this case, where there was no written application, nor any terms of the policy agreed upon by parol except the amount, the insured must be charged with knowledge that the policy he receives contains the contract binding upon him as well as the insurer. He must know that the policy, which is the contract, contains the usual terms of such instruments. He may not lay it aside without reading, and, when he seeks to recover upon it, and finds that under its plain provisions he cannot recover, say: 'I did not read it. The insurer did not tell me what it contained. I did not know that it was necessary to tell

him about the title and condition of my property, and therefore I am not bound by its terms.' Had Mr. Pearson or his principal read the contract—which he could have done in a few moments—they would at once have known these plain and important conditions, which the defendant had the clear right to insert, and to make a condition of its validity. Certainly the insured must be held to some degree of diligence in obtaining knowledge of the contracts to which they are parties. Ignorance will not relieve a party from his contract obligations. The law only relieves him therefrom in cases of fraud, mistake, waiver, or estoppel. An insurer is not required by the law to inquire into the condition of the title to the property insured, or to inform the insured of all the conditions and terms of the policy to be issued, or to read it to him, or inform him of its contents. When received and accepted without objection, he must be held bound by its terms, unless these terms are waived by the insurer. This is the law of contracts, and there is no reason or authority for holding that an insurance contract is an exception thereto. A deed is the contract between the grantor and the grantee, although the grantee does not sign it. Its terms and conditions are binding upon the grantee, and he cannot avoid them except for one of the reasons above stated. If he accepts a deed without reading it, and there is no fraud on the part of the grantor, or mutual mistake as to its terms, he is bound by it. If a mortgagee accepts a mortgage without a covenant against prior incumbrances, or if it contains an express provision that it is subject to prior incumbrances, it is binding upon him, unless the covenant against incumbrances was omitted by fraud or mistake. The same rule applies to insurance contracts." The necessity that a fire insurance company, which for a small sum of money promises to pay a large amount of money by way of indemnity in case of fire, should be fully informed as to the extent of the risk is obvious. Chief Justice Marshall said, in

Columbian Ins. Co. v. Lawrence (1829), 2 Pet. *25, *49, 7 L. Ed. 335: "The contract for insurance is one in which the underwriters generally act on the representation of the assured; and that representation ought consequently to be fair, and to omit nothing which it is material for the underwriters to know. * * * Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles, as on the interest, of the assured; and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss." So it was declared in *Syndicate Ins. Co. v. Bohn* (1894), 65 Fed. 165, 170, 12 C. C. A. 531, 536, 27 L. R. A. 614, that limitations like the one in question "rest upon a sound policy of the business of insurance—a policy founded in reason, and in accord with an enlightened public policy; the policy of reducing the moral hazard to which the underwriter is exposed. 'Moral hazard,' in insurance, is but another name for a pecuniary interest in the insured to permit the property to burn. Statistics, experience, and observation all teach that the moral hazard is least when the pecuniary interest of the insured in the protection of the property against fire is greatest, and that the moral hazard is greatest when the insured may gain most by the burning of the property."

It ought not to be necessary, however, to seek to justify the existence of a condition precedent. It ought to be enough that it is a component part of the contract, and has not been waived, and that the contract must be made the basis of recovery. In the vigorous language of Woodward,

C. J., in *Pennsylvania Ins. Co. v. Gottsman* (1864), 48 Pa. St. 151, 158: "The ground of forfeiture is the contract, not the opinion of a jury about increase of risk. * * * The suit is upon that contract, and if it is forfeit, the suit falls with it. It cannot be enforced in behalf of a party who violated a fundamental condition." There are cases which support the view of the majority in this case, but I assert that they are not only comparatively few, but also that it is evident that they owe their origin to a misapplication of the old doctrine of concealment. Before the adoption of the standard policy, it was the practice to embody the warranties of the assured in an application, and as a result it followed that in many cases, where the company had neglected to take an application, the only defense which the company could assert was concealment. Now, concealment involves the proposition that the assured ought to have made the disclosure, and therefore the courts, in passing on these cases, and the text-writers, in discussing them, frequently made reference to the fact that, as the representatives of the insurance company were experts, the assured had a right to suppose that as to the ordinary risks, such as the condition of the title, etc., the company had acquainted itself with the facts. It was enough, therefore, so far as the interest of the assured was concerned, that he had an insurance interest. With the incoming of the standard policy all of this was changed; but a few courts, misapprehending the non-application of the doctrine of concealment to a peremptory condition precedent that the ownership must be sole and unconditional, and the title in fee simple, were led into error by the language of the books to which I have referred. The condition in the standard policy provides the manner in which the policy may be made to take effect, where the ownership is not sole and unconditional and the title in fee, namely, by procuring a special indorsement to be placed on or added to the policy; and the effect of such a condition as this is to

call on the policy holder to make disclosure, and to authorize the company, at least in the absence of notice, to assume that the ownership and title complies with the condition. It is a well-known fact that insurance companies issue policies without a formal examination of the title, and, in the face of the stipulation in the policy, the property owner has no right to assume that the company will not stand upon its rights.

In the absence of misleading conduct, waiver can only be predicated upon the relinquishment of a right which is known (Bishop, Contracts [2d ed.], §792; 29 Am. and Eng. Ency. Law [2d ed.], 1091, 1093), and the knowledge upon which a claim of waiver is based must be actual, and not merely constructive. *Aetna Ins. Co. v. Holcomb* (1896), 89 Tex. 404, 34 S. W. 915; *Orient Ins. Co. v. Williamson* (1895), 98 Ga. 464, 25 S. E. 560; *Mutual Fire Ins. Co. v. Deale* (1861), 18 Md. 26, 79 Am. Dec. 673; 16 Am. and Eng. Ency. Law (2d ed.), 935. And see *Hazlett v. Sinclair* (1881), 76 Ind. 488, 40 Am. Rep. 254; *Stockwell v. State, ex rel.* (1885), 101 Ind. 1.

The weight of authority, where a matter of principle is involved, is a minor consideration; but since I am not only so unfortunate as to differ with my brethren, but also to be confronted with a formidable amount of apparent authority for the conclusion reached, it becomes necessary to review their authorities. *Morotock Ins. Co. v. Rodefer Bros.* (1896), 92 Va. 747, 24 S. E. 393, 53 Am. St. 848, holds that the clause relative to unconditional and sole ownership does not have reference to the legal title, but to the interest of the insured in the property, and that therefore the existence of a mortgage does not violate said clause. The next case—*Manhattan Fire Ins. Co. v. Weill & Ullman* (1877), 28 Gratt. (Va.) 389, 26 Am. Rep. 364—involved the same point, and was a case where the agent knew that the property stood on leased ground. *Philadelphia Tool Co. v. British, etc., Assur. Co.* (1890), 132

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Pa. St. 236, 19 Atl. 77, 19 Am. St. 596, is an obscure case in its statement of facts, and seems to rest on the ground that "the policy covering only the interest of the lessee, the ownership of the fee becomes immaterial." In *Western, etc., Pipe-Lines v. Home Ins. Co.* (1891), 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. 703, the facts were these: Insurance had been written on oil in a large storage tank. There was no condition as to ownership of the real estate, but the property had been described as situate upon certain land. A flood had washed the tank containing the oil to other real estate, where the fire occurred. The insurance company denied liability because of this, and also because the pipe-line company had but a qualified title to the oil. It was held that the description of the real estate on which the tank had been located was not a warranty against an involuntary change in the location of the tank. As to the lack of an absolute ownership of the oil, it was held that the defense was not available, as the insurance company had denied liability on another ground, and as the insurance company was required to take notice, in view of the corporate character and business of the pipe-line company, of the manner in which such business was ordinarily conducted. *Short v. Home Ins. Co.* (1882), 90 N. Y. 16, 43 Am. Rep. 138, involved the condition against the premises becoming vacant or unoccupied. The case seems to rest largely on the fact that the agent testified that it was his habit to make inquiry concerning matters that he regarded as important. Although there are one or two statements in the case concerning the duty of making inquiry, yet I am of opinion, in view of *Weed v. London, etc., Ins. Co.* (1889), 116 N. Y. 106, 22 N. E. 229, and *Quinlan v. Providence Washington Ins. Co.* (1892), 133 N. Y. 356, 31 N. E. 31, 28 Am. St. 645, that the New York court of appeals cannot be said to sanction the view that the fundamental conditions of a policy may be disregarded. In *Hoose v. Prescott Ins. Co.* (1890), 84 Mich. 309, 47 N. W.

587, 11 L. R. A. 340, certain conditions upon which the validity of a policy depended had not been complied with, but the agent had actual knowledge of the facts, and the delivery of the policy was treated as a waiver of such conditions. In *Hall v. Niagara Fire Ins. Co.* (1892), 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. 497, there was a waiver of the condition as to title, by the consent of the agent subsequently given to a transfer of the policy to a person who had acquired the fee-simple title. *Miotke v. Milwaukee, etc., Ins. Co.* (1897), 113 Mich. 166, 71 N. W. 462, was a case which turned on the proposition that in view of the conduct of the agent in dealing with the assured—an ignorant foreigner—it would be a fraud to permit the company to avoid its policy. In *Lycoming Fire Ins. Co. v. Jackson* (1876), 83 Ill. 302, 25 Am. Rep. 386, a finding in favor of the assured rested on testimony that the agent had actual knowledge as to the condition of the title. In *Morrison v. Tennessee, etc., Ins. Co.* (1853), 18 Mo. 262, 59 Am. Dec. 299, there was no provision in the policy concerning ownership. The case involves nothing but the doctrine of concealment. The holding in *Quarrier v. Peabody Ins. Co.* (1877), 10 W. Va. 507, 27 Am. Rep. 582, was that the existence of a deed of trust did not violate the condition as to sole and unconditional ownership. In *Georgia Home Ins. Co. v. Holmes* (1897), 75 Miss. 390, 23 South. 183, 65 Am. St. 611, there was a mortgage on the property. The assured had requested the agent to furnish an application and to inspect the house. The agent did not comply with these requests, but answered that he knew the property. It was held that the policy was issued on the presumed knowledge of the company, and it was not a defense that the agent was in error. *Vankirk v. Citizens Ins. Co.* (1891), 79 Wis. 627, 48 N. W. 798, involved the doctrine as to concealment. The citations to 1 Wood, Insurance (2d ed.), §212, p. 517, and 1 May, Insurance (4th ed.), §207, are to the same point. I shall

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refer to the latter author hereafter. *German Mut. Ins. Co. v. Niewedde* (1895), 11 Ind. App. 624, must be regarded as overruled by *Sisk v. Citizens Ins. Co.* (1897), 16 Ind. App. 565. As to the further authorities upon the point under discussion, which are found in the majority opinion, it must be admitted that the supreme courts of Nebraska, Montana, Washington, and California, and perhaps Kentucky, as well as the opinion in *Manchester Fire Assur. Co. v. Abrams* (1898), 89 Fed. 932, 32 C. C. A. 426, are properly cited as holding that the condition as to ownership and title does not avoid the policy. In two instances there were dissents; in some of the cases there was a mere assumption in the discussion that it was the doctrine of concealment which was involved; while, in the cases which go further, it will be perceived that they also are based on the root error just referred to.

I turn now to the authorities which uphold my view. The following cases evince the peremptory character of the condition here involved, or of a like condition: *Geiss v. Franklin Ins. Co.* (1890), 123 Ind. 172, 18 Am. St. 324; *Syndicate Ins. Co. v. Bohn*, *supra*; *Waller v. Northern Assur. Co.* (1881), 10 Fed. 232; *Crikelair v. Citizens Ins. Co.* (1897), 168 Ill. 309, 48 N. E. 167, 61 Am. St. 119; *Hinman v. Hartford Fire Ins. Co.* (1874), 36 Wis. 159; *Hebner v. Palatine Ins. Co.* (1894), 55 Ill. App. 275; *Dumas v. Northwestern Nat. Ins. Co.* (1898), 12 App. D. C. 245; *Duda v. Home Ins. Co.* (1902), 20 Pa. Super. Ct. 244; *Brown v. Commercial Fire Ins. Co.* (1888), 86 Ala. 189, 5 South. 500; *Liberty Ins. Co. v. Boulden* (1893), 96 Ala. 508, 11 South. 771; *Collins v. St. Paul, etc., Ins. Co.* (1890), 44 Minn. 440, 46 N. W. 906; *Weed v. London, etc., Ins. Co.*, *supra*; *Fitchburg Sav. Bank v. Amazon Ins. Co.* (1878), 125 Mass. 431; *Sisk v. Citizens Ins. Co.* (1897), 16 Ind. App. 565; *Mers v. Franklin Ins. Co.* (1878), 68 Mo. 127; *Barnard v. National Fire Ins. Co.* (1887), 27 Mo. App.

26; *Westchester Fire Ins. Co. v. Weaver* (1889), 70 Md. 536, 17 Atl. 401, 18 Atl. 1034, 5 L. R. A. 478; *Phoenix Ins. Co. v. Public Parks, etc., Co.* (1896), 63 Ark. 187, 37 S. W. 959; *Orient Ins. Co. v. Williamson, supra*; *Rosenstock v. Mississippi Home Fire Ins. Co.* (1903), 82 Miss. 674, 35 South. 309. In the leading case of *Syndicate Ins. Co. v. Bohn, supra*, Sanborn, J., used the following language: "It is contended that the contracts in these policies, which exclude the Bohns from insurance under them upon any interest but that of unconditional ownership, are without binding force, because no inquiry respecting their title was made by the companies, and no statement concerning it was made by the Bohns, when these policies were issued. But neither inquiry nor statement before the issue of the policies was requisite to the validity of these contracts. The policies themselves, containing, as they did, the contracts that they should be void if the interest of the assured had not been truly stated to the company, or if it was not truly stated in the policy, or if it was not the sole and unconditional ownership, and a description of it was not indorsed on the policy, were pointed inquiries of the assured whether their interest was the sole and unconditional ownership of the property described, and their silence and acceptance of the policies was the answer. The policies themselves were notice to the Bohns that the companies deemed their interest that of unconditional ownership, that they insured them against loss to that interest only, and that they expressly excluded every other interest from the insurance unless the Bohns immediately notified them that they held a different interest, and caused a true description of it to be written into or indorsed upon the policies. The silent acceptance of the policies by the Bohns closed these contracts, and bound them to the agreement tendered by the policies, that every interest of theirs but that of unconditional ownership was excluded from the promised indemnity." In *Waller v. Northern Assur. Co.*,

supra, the policy provided: "If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, * * * it must be so represented to the companies, and so expressed in the written part of this policy; otherwise the policy will be void." The interest of the assured was only a lien in the nature of a mortgage, given to secure a loan of about \$5,000. This fact was not represented to the insurer, and was not stated in the policy. It was said by McCrary, J.: "There are strong reasons for upholding and enforcing the provision of the policy under consideration. It is certainly a very reasonable and proper provision in a contract of insurance of this character, which requires the party seeking insurance upon property to state any facts which it is material for the insurer to know. * * * The provision in question is, therefore, one which must be upheld and enforced; not simply upon the ground that it is a warranty, and therefore to be enforced independently of its materiality, but upon the ground that it calls for the disclosure of material facts. * * * But it is insisted that compliance with this provision of the policy was waived by the defendant, because its agent made no inquiry concerning the extent of plaintiff's interest, and plaintiff made no statement upon the subject. The evidence does not support this position. The contract was that if the interest of the assured was any other than the entire, unconditional, and sole ownership, then he was to represent the facts to the company—not that he was to disclose them truthfully if requested, or that he would make true and full answers to questions upon the subject. The duty of disclosing his interest, the same being less than the entire ownership, was plainly devolved upon the plaintiff, and for good reason, since he knew, and the agent of the company did not know, the facts. In other words, under the contract the defendant was authorized to assume that the property was owned absolutely by the ap-

plicant for insurance, unless the contrary was represented by him, and more especially in a case where the applicant held what appeared to be an absolute title. A waiver of this condition of this policy cannot, therefore, be presumed from the mere fact that the agent of the defendant made no inquiry upon this subject. The case might have been different if the plaintiff had been called upon to sign an application, and to answer written or printed questions touching his interest, and had failed to do so. In such a case the issuing of the policy, notwithstanding a failure to answer some of the questions, might well be held a waiver of such answers. *Hall v. People's, etc., Ins. Co.* [1856], 6 Gray 185; *Liberty Hall Assn. v. Housatonic, etc., Ins. Co.* [1856], 7 Gray 261. And it may also be true that where the policy requires an application, and provides that it shall contain a full and true exposition of all the facts in regard to the condition, situation, value, and risk of the property insured, a company insuring without such application may be held to waive the representations required to be embraced therein. *Commonwealth v. Hyde, etc., Ins. Co.* [1873], 112 Mass. 136. These authorities are not in point, for the reason that in the present case no written application was provided for in the policy, and, as already stated, the duty of divulging the fact that he was not the full owner of the property devolved upon the plaintiff. Besides, it would be an unwarranted extension of the doctrine of estoppel to hold that a party may waive that, the existence of which he does not know, and is not in duty bound to ascertain."

In *Dumas v. Northwestern Nat. Ins. Co.*, *supra*, the precise question which is here involved was before the court. In the course of a careful opinion the court, after referring to such condition, said: "But it is said that all this is of no consequence, inasmuch as the defendant company made no inquiry as to the true condition of things, and there was no fraudulent concealment on the part of

the plaintiff. And there is excellent authority for the doctrine, that 'as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must be supposed to assume them; and if he acts without inquiry anywhere concerning them, he seems quite as negligent as the insured, who is silent when not requested to speak.' *Clark v. Manufacturers Ins. Co.* [1850], 8 How. *235, 12 L. Ed. 1060. The agents of insurance companies are usually experienced men, well informed as to the information which they should have in anticipation of the risk which they assume; and the rule is not unreasonable which would require them to make all due inquiry for the procurement of such information. Nor is it unreasonable that the insured should be held harmless from the mere failure to give information, when he is not interrogated, and when perhaps he is not aware of the importance or immateriality of the matter to which the information should extend. But this is not a case of representation or misrepresentation, of failure to give information or failure to elicit it by proper inquiry. The parties have deliberately put it into their contract, and have made it an essential condition of that contract that the contract itself should not be binding if there was any mortgage on the property or the title was not that of unconditional ownership. There was no inhibition by law against the insertion of such a condition in the contract; and it may well be that its insertion was a matter of precaution, to guard as well against the negligence or failure of agents to elicit proper information, as against the negligence or failure, not fraudulent, of persons seeking insurance to give such information. The condition is not illegal and does not contravene any rule of public policy; and even if its practical effect should be held to be to throw upon the insured party the burden of giving voluntarily the information which otherwise the insurer would have been required to elicit by proper inquiry, we know of no rule of law that

would preclude parties from contracting to that effect, if they so desire." *Duda v. Home Ins. Co.*, *supra*, is a well-considered case upholding the views I am endeavoring to maintain. I refer to it for an explanation of the Pennsylvania cases. In *Brown v. Commercial Fire Ins. Co.*, *supra*, the court said: "The assured by accepting a policy in which such condition is incorporated, becomes bound thereby; and when he claims to enforce the contract, and receive its benefits, he is estopped from denying his assent to the stipulation." In *Weed v. London, etc., Ins. Co.*, *supra*, a policy was issued to insure the "Estate of O. Richards." Richards had deeded the property to Dean Sage, in trust to sell the same and distribute the proceeds of such sale *pro tanto* among the creditors of said Richards, any residue, after the payment of debts, to be reconveyed to said Richards or to his heirs. The agent who issued the policy knew of the failure of Richards, but did not know of the trust deed. There was a standard form of policy, and it was held that "this condition as to the ownership of the property was precedent as to the attaching of the risk; and as Richards' estate had no title it was broken upon the delivery of the policy. Upon this point of the case, therefore, the plaintiff failed to prove a valid contract and was not entitled to recover." In *Collins v. St. Paul, etc., Ins. Co.*, *supra*, the court, after denying the right to a reformation of the policy upon the facts, said: "Even if so reformed, no recovery could be had, for the policy provides that the company shall not be liable 'if the interest of the assured in the property is not one of absolute and sole ownership,' and it appeared beyond controversy that the plaintiff had only a life estate in the property. Of course she had an insurable interest, but that interest was not insured. The policy expressly excluded from its operation any interest other than the absolute and sole ownership." In *Crikelair v. Citizens Ins. Co.* (1897), 168 Ill. 309, 310, 48 N. E. 167, 61 Am. St. 119, Boggs, J., in

delivering the opinion of the court, used the following language: "By the stipulation in the policy, the terms of which are plain, direct, and unambiguous, the parties hereto agreed that if the insured property, at the time the insurance was effected, was encumbered by chattel mortgage, the indemnity should not attach but the policy should be void. This was the contract of the parties deliberately made, and the only question presented is, whether they are bound by it. They were competent to enter into the stipulation, no rule of law was contravened by it, and there is no ground apparent to us upon which to base a claim of either estoppel or waiver. The law declared by the greater weight of authority is that, where a policy contains a stipulation such as the one in the case at bar, and the property be, at the time of the execution of the policy, covered by a mortgage, no recovery can be had unless it appears that there was a waiver or estoppel by which the company is precluded from relying on the contract."

The text-writers may ordinarily be relied on to make an unbiased statement of the adjudications as they are, and therefore I quote briefly from some of the writers on the law of insurance. A late writer, after referring to the condition as to ownership and title which is found in the standard policy, makes this comment: "Without this requirement there would be no duty incumbent on the insured to state the character of his interest, provided he had an interest that was insurable. The condition above quoted, however, requires a description of that interest, and it seems that the condition applies even to those policies that are issued without a previous application; for, if the policy does not elsewhere contain a statement of the character of the interest, it will be implied, by reference to the latter condition, that the interest is represented as being sole and unconditional." Vance, Insurance, p. 443. Another writer says: "There is some conflict of authority on the question of the binding effect of provisions of this

character in a policy issued without a written application. The weight of authority doubtless supports the view that the insured, by accepting the policy, is charged with knowledge of its contents." Elliott, Insurance, §257. Still a third text-writer states the doctrine thus: "A condition that if the insured is not the sole, entire, and unconditional owner the policy shall be void is reasonable and valid, and violation of it will prevent recovery. And failure to disclose the real state of the title if not sole, etc., will be fatal although the insured was not questioned as to that fact." 1 May, Insurance, §287a. In 13 Am. and Eng. Ency. Law (2d ed.), 228, it is said: "Explicit questions are largely or wholly replaced by conditions that the interest of the insured must be truly stated, and that if the title or interest is other than one specified, it must be specifically described, or the insurance will be avoided; and the statements of title in the policy, where there are such conditions, are construed in the same manner as answers to express interrogatories. The conditions have the effect of questions as to the nature of the title or interest, and in case a statement thereof would be false or insufficient if made in answer to a question, or if the facts are not disclosed which would be required in such answers, there is a breach of the contract. Where such conditions are contained in the policy, and there is no statement of the title or specific interest, an acceptance of the policy amounts to a representation by the insured that his title or interest is that stated in the condition, and if his title or interest is substantially different, the insurance is avoided." The case of *Geiss v. Franklin Ins. Co.* (1890), 123 Ind. 172, 18 Am. St. 324, is deserving of special attention, since it is a decision of this court, and involves practically the same question as the one before us. There was a condition as to sole, absolute, and unconditional ownership in the policy, and among other things which the company agreed to insure was a soda-fountain and apparatus, which had been pur-

chased under a conditional-sale contract, and had not been fully paid for. It appeared in the evidence that the plaintiff was not aware of the legal effect of the contract of conditional sale, so far as it affected the ownership of the property, until he had taken professional advice after the fire. It was held that the policy was entirely void. Mitchell, C. J., speaking for the court, said: "It is conceded that the assured was not the sole, absolute, and unconditional owner of the soda-fountain, and apparatus connected therewith. It follows, as a matter of course, that, as applied to that item of property, the policy was void. *Carpenter v. German-American Ins. Co.* [1889], 52 Hun 249, 4 N. Y. Supp. 925. The question is, can it be upheld as respects the other separate and distinct classes of property? * * * We fully appreciate the unfortunate situation of the assured, but courts of law cannot be made asylums in which every person who has made a mistake can take refuge against his own contract deliberately entered into. Where the validity of the insurance is made to depend upon the assured's being the absolute and unconditional owner of the true title of the property insured, a failure to set forth the title with substantial accuracy renders the policy void, not only as to the property, the title to which is not truly represented, but all other property covered by the same policy, and subject to the same risk. This is so, even though the owner had no intention to deceive." It thus appears that we have a case in our own reports which the principal opinion is virtually overruling.

The conclusion of the majority is opposed to principle; it is out of accord with the weight of authority, and it involves a disregard of the doctrine of *stare decisis*. As I have attempted to point out, this holding cannot be maintained if the court looks to the solemn dispositive agreement of the parties in determining their rights. I cannot give my sanction to a decision that nullifies the most important element in the contract, from the standpoint of the com-

pany. It is to be remembered that fire losses are in almost every instance paid out of the premiums received, and not out of the capital of the company. Careful people, who read their policies, are entitled to some consideration, and ought not to have their premiums enhanced by the fact that essential limitations of liability put into insurance policies are disregarded by the courts. I cannot better conclude this portion of my opinion than by calling attention to the following language of Story, J., in *Carpenter v. Providence Washington Ins. Co.* (1842), 16 Pet. 495, 10 L. Ed. 1044: "The public, too, have an interest in maintaining the validity of these clauses, and giving them full effect and operation. They have a tendency to keep premiums down to the lowest rates, and to uphold institutions of this sort, so essential, in the present state of our country, for the protection of the vast interests embarked in manufactures, and on consignments of goods in warehouses. If these clauses are to be construed with a close and scrutinizing jealousy, when they may be complied with in all cases, by ordinary good faith and ordinary diligence on the part of the assured, the effect will be to discourage the establishment of fire insurance companies, or to restrict their operations to cases where the parties and the premises are within the personal observation and knowledge of the underwriters. Such a course would necessarily have a tendency to enhance premiums; and to make it difficult to obtain insurances where the parties live, or the property is situate, at a distance from the place where the insurance is sought. But, be these considerations as they may, we see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, which, upon reason or principle, he has no right to ask the court

to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations, which, but for those stipulations, would not have been entered into."

As to the question of pleading, I am of opinion that the answer of appellant was good without an averment that it had tendered a return of the premium. The holding of it after knowledge of the fact that the risk had never attached would at most operate as a waiver, and matter of that character ought, in the order of things, to come from the plaintiff. It appears to me that if there is nothing further in the case than a failure of the minds of the parties to meet, the case is one for a return of the premium. *New York Life Ins. Co. v. Fletcher* (1886), 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *Waller v. Northern Assur. Co.* (1884), 64 Iowa 101, 19 N. W. 865. I vote for a reversal.

ON PETITION FOR REHEARING.

JORDAN, J.—Appellant has petitioned for a rehearing and supported the same by an able argument on the part of its counsel. We have examined the authorities

19. cited by counsel and have again given the case careful and patient consideration. Upon the question here involved the authorities may be said to "fight on both sides." Nevertheless, they are not so overwhelmingly on either side that they should be held, as seemingly insisted, to preclude us from adopting and following what we believe to be the better rule and the one which, because of its fairness and reasonableness, commends itself to our approval. It is admitted that our holding at the former hearing upon the point in issue is sustained by the

4. supreme courts of Nebraska, Montana, Washington, California, and "possibly Kentucky," and by the decision of the court in the case of *Manchester Fire Assur. Co. v. Abrams* (1898), 89 Fed. 932, 32 C. C. A. 426, but

this concession is certainly too narrow, for, with the courts hereinbefore mentioned must be classed or included the supreme courts of Michigan, Oregon, Virginia, Mississippi, Pennsylvania, Missouri, Alabama, Wisconsin, West Virginia, and probably New York. The decisions of some of the latter courts directly sustain the doctrine in question, while others may at least be said indirectly to support the principle. To the cases or authorities cited and relied on by this court in its original opinion herein, we may add the following: *Allesina v. London Ins. Co.* (1904), 45 Ore. 441, 78 Pac. 392; *Union Assur. Soc. v. Nalls* (1903), 101 Va. 613, 44 S. E. 896, 99 Am. St. 923; *Farmers, etc., Ins. Co. v. Mickel* (1904), (Neb.), 100 N. W. 130; *Brunswick, etc., Co. v. Northern Assur. Co.* (1905), 142 Mich. 29, 105 N. W. 76; 1 Wood, Insurance (2d ed.), §176; 3 Cooley, Briefs on Insurance, 2630, 2631.

In the appeal of *Allesina v. London Ins. Co.*, *supra*, the policy there involved, when issued, contained a printed provision that it should be void "if the subject of the insurance be personal property, and be or become encumbered by a chattel mortgage." This policy was issued upon an oral application, the agent of the company making no inquiry of the insured concerning liens or encumbrances upon the property, nor were there any statements or representations made in reference thereto by the insured, and he had no knowledge that such information was material, or that the policy to be delivered would contain any provision in reference thereto, or that if the company knew of the mortgage upon the property it would decline to assume the risk. The insured paid and the company received and accepted the premiums, and the property was destroyed by fire during the life of the policy. The court, in that case, said: "The only question on this appeal is whether, under these circumstances, the defendant can defeat a recovery on the ground that the policy issued by it and delivered to the plaintiff and for which he paid and it accepted and re-

tained his money was invalid from the beginning because of the mortgage clause." This case, under the facts, may be said to be on principle on "all fours" with the case at bar. The policy involved in that appeal was sustained. In deciding the case the court, in the course of its opinion, said: "A contract of insurance, like any other contract, must, of course, be given force and effect according to its terms as agreed upon by the parties, but provisions in the printed forms, inserted for the benefit of the insurer, may be waived by it in special instances. In determining whether there has been such a waiver, a court should not overlook the fact that insurance policies are prepared by the company for general use, without reference to particular cases, and contain divers and sundry provisions and stipulations concerning different subjects. The contract is not like ordinary contracts between individuals, wherein every clause and stipulation is considered and agreed upon by the parties before the agreement is executed. A policy of insurance is prepared in the office of the company and becomes binding on the assured because it is delivered to and accepted by him. In accepting it he has a right to assume that the company does not intend to insist upon the printed clause therein relating to encumbrances on the property if it makes no inquiry of him concerning the matter, and he has made no statements in reference thereto, and has not been advised that the question was at all material. The preparation and issuance of the policy is the act of the company, and if, in pursuance of a previous agreement to insure, it issues and delivers a policy purporting to cover loss or damage by fire, and accepts and receives the money of the insured, without making any inquiry of him as to encumbrances, or without advising him of the effect on his contract of an encumbrance, it is receiving and accepting his money under circumstances but little short of false pretenses, if the contract is void from the beginning, and never in fact had any force

or validity, because of a provision inserted therein by it without the knowledge of the assured, rendering it void if the property is encumbered. In such a case the company would not only wrongfully receive and accept the money of the insured, but would mislead him into the belief that his property was insured, when in fact it was not, thus deceiving a party honestly seeking and paying for insurance." In 1 Wood, Insurance (2d ed.), §176, the rule is stated as follows: "When a policy is issued upon a verbal application, without any representations in reference thereto, all information relative to the risk, except such as is unusual and extraordinary, is waived, and the policy is valid, even though it contain a clause or stipulation that 'the insured covenants that the representations given in the application for this insurance contain a just, full and true exposition of all facts and circumstances in respect to the condition, situation, value and risk of the property insured,' and, although the policy professes to be made upon the faith or representations made by the insured, yet, it is valid, even though no representations whatever were made in reference to the risk, and the lack thereof is not a matter of defense. The insurer cannot charge the assured with laches, induced by its own conduct." In 3 Cooley, Briefs on Insurance, pp. 2630, 2631, the author says: "If an insurance company issues a policy of insurance without any application, or without representations in regard to certain facts, the company will be presumed to have written the policy on its own knowledge, and cannot complain, after loss, that such facts were not correctly stated in the policy or disclosed by the insured. * * * Analogous to the rule stated is another one to the effect that though the policy by its terms requires the disclosure of all material facts, yet if the insurer issues it on an oral request or application, and makes no inquiry in regard to matters covered by certain conditions in the policy—as, for instance, encumbrances—it will be assumed that the insurer waives knowledge as to such

facts." The author says, however, that the rule stated is not supported by all the authorities, but, on the contrary, it is a mooted question whether an insurer waives the condition in a policy by issuing it without inquiry.

While it is true that the *quantum* of appellees' interest or title in the property insured was not a fee simple, still they had an insurable interest as tenants for life,

20. and that is the only interest which appellant can be said to have insured, and the value of the property destroyed by fire, when tested by such interest, would be the measure of the company's liability. We cannot discover wherein appellant has been actually prejudiced by reason of the fact that the interest of appellees in the property insured was not that of a fee simple. Possibly it might be said that the fact that appellees were not the owners in fee might afford a temptation or inducement for them to set the property on fire, on the supposition that they would receive the full amount for which it was insured, regardless of the value of their interest. As appellant company did not in any manner inquire of appellees in respect to their interest in or title to the property, they certainly had no reasons for presuming when they paid the price of the insurance and received the policy issued to them that the company would not have insured the property had it known that their interest in the building insured and in the premises upon which it was located was that of a life estate instead of a fee simple. Generally speaking, it may be asserted that it is not the custom of the insurance company to place the policy to be issued by it before the person to be insured prior to its delivery to him, but the first opportunity afforded him for an examination of the many printed conditions and stipulations therein contained is after he has paid the premium for the insurance and the policy has been delivered. It ought not to be considered or regarded that he agreed to all of the conditions and

stipulations in the policy before he was aware or

6. had knowledge thereof, especially in respect to such stipulation or condition declaring that the policy shall be void if his interest in or title to the property insured is other than that therein stipulated by the company without its having made any inquiry of him relative to his interest or title in or to the property which he desired insured, or in the absence of any representations or statements made by him in respect to his interest or title.

Appellant's learned counsel contend that it cannot be asserted that it waived its right to repudiate the liability upon the policy unless it is shown it had knowledge

21. of all of the facts constituting the waiver. But it certainly had knowledge of its own conduct in the matter, and a waiver may be manifest by conduct as well as by words. *Phenix Ins. Co. v. Tomlinson* (1890), 125 Ind. 84, 9 L. R. A. 317, 21 Am. St. 203.

Possibly, with equal force, it might be said that appellees ought not to be considered as having consented or agreed, without knowledge thereof, to the condition

22. or stipulation in the policy which avoided the insurance, if their interest or title to the property was otherwise than that of a fee simple. It is true that it can with plausibility be asserted that it was their duty to read the policy issued to them, but suppose they did read it after its delivery and the payment by them of the premium and then discovered the provision in respect to a forfeiture, they were not then in a position, and had not the right, to cancel or surrender the policy and recover back the premium which they had paid; for the very moment the risk actually attached they could not thereafter have recovered back the premium. *Standley v. Northwestern, etc., Ins. Co.* (1884), 95 Ind. 254; *Phenix Ins. Co. v. Tomlinson, supra*.

Suppose they had made a demand thereafter of appellant company for a return of the premium paid, the latter

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would possibly have parried the demand by asserting that its right under the circumstances was one which it could at its option waive, therefore it would retain the premium paid by appellees and await results. The case of *German Mut. Ins. Co. v. Niewedde* (1895), 11 Ind. App. 624, to which we referred in the former opinion, presented the question of a waiver of the breach of the conditions contained in the policy therein involved by reason of an existing mortgage encumbrance against the property. That case, upon the issue of waiver as herein involved, is directly in point, and supports our holding, and upon the question as to what will constitute a waiver of a forfeiture clause in a policy the case has not been overruled, as contended by counsel, by any of the later decisions of the Appellate Court.

In *Continental Ins. Co. v. Munns* (1889), 120 Ind. 30, 5 L. R. A. 430, this court held that the neglect of the party insured to make known facts which the insurance

4. company may regard as material to the risk is not a breach of a condition in the policy avoiding it.

The court in that case asserted that the insured had the right to assume that the insurance company would make inquiry concerning all facts, except such as it is supposed to know, or which it regards as immaterial. In the course of the opinion in that appeal this court said: "An applicant for insurance is not bound, unless inquired of, to disclose whether or not the property insured is encumbered. As the public records usually give information in reference to such matters, he may assume that the insurer knew of any existing encumbrances, or deemed it immaterial whether or not the property was encumbered." So, in this case, possibly appellees may have assumed that appellant made no inquiries of them in respect to their particular interest in the property in question because it had ascertained from the public records of what that interest con-

sisted. Much stress is placed by counsel for appellant upon the fact that the policy in this case is what is denominated a "standard policy," all of which class of policies is said to contain the sole-ownership clause or stipulation. It is argued that by the use of these policies all inquiries of the insured to disclose the extent and condition of his title to or interest in the property has been rendered unnecessary, and is so held by the courts; but an examination of the cases which we have cited will prove the contrary, for at least in many of them, if not all, the policies involved embrace the sole-ownership clause or a stipulation against existing encumbrances. Nevertheless, the courts affirmed that notwithstanding this clause or stipulation, where there was nothing in the policy requiring the insured to disclose the character or condition of his title to the property or the extent of his interest therein, and, if the insurance company had failed to make an inquiry in relation thereto, and issued the policy without any representations or statements made by the insured in respect to the character or extent of his interest or title, the company could not be heard to complain that his interest was less than a sole ownership or was encumbered by an existing mortgage lien. The case of *Geiss v. Franklin Ins. Co.* (1890), 123 Ind. 172, 18 Am. St. 324, is relied upon by appellant. In that case, however, there was no issue raised or tendered of a waiver upon the part of the company of the condition in the policy that it should be void "in case the assured was not the sole, absolute, and unconditional owner of the property." Therefore that case cannot be said to lend any support to the question of waiver at issue in this appeal. It may probably be a mooted question as to whether the insured in that case had any insurable interest in the soda-fountain, the title of which, under the agreement between him and the seller, was to remain in the latter until the purchase price thereof had been paid in

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full. So far, however, as the decision in that case can be said to announce or support a principle contrary to that which we assert and adhere to in this case, it is expressly disapproved.

We are satisfied with the conclusion which we have reached in this case, and the petition for rehearing is therefore overruled. All concur except Gillett, J.

AMERICAN EXPRESS COMPANY v. THE STATE.

[No. 20,565. Filed November 27, 1906.]

From Lawrence Circuit Court; *James B. Wilson*, Judge.

Action by the State of Indiana against the American Express Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Matson & Giles and *Baker & Daniels*, for appellant.

Charles W. Miller, Attorney-General, *Miller & Hadley* and *Brooks & Brooks*, for appellee.

MONKS, J.—The questions presented in this case are the same as those involved and decided in *Adams Express Co. v. State* (1906), *ante*, 428, *American Express Co. v. State* (1906), *ante*, 319, *American Express Co. v. Southern Ind. Express Co.* (1906), *ante*, 292, and *Adams Express Co. v. State* (1903), 161 Ind. 328, and upon the authority of said cases, this case is affirmed.

DARBY ET AL. v. ANDERSON.

[No. 20,676. Filed May 29, 1906. Rehearing denied December 12, 1906.]

From Clinton Circuit Court; *Samuel R. Artman*, Special Judge.

Petition by Edward L. Darby and others, against which John Anderson defends. From a judgment for defendant, petitioners appeal. *Reversed.*

John C. Farber, *D. S. Holman* and *James V. Kent*, for appellants.

Asa H. Boulden and *Martin A. Morrison*, for appellee.

MONKS, J.—The questions presented by the record in this cause are the same as those in *Good v. Burk* (1906), *ante*, 462, and on the authority of that case the judgment in this case is reversed, with instructions to sustain appellants' motion to dismiss the appeal and return the papers in said cause to the board of commissioners for further proceedings.

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[NOTE.—The citation *Hayes v. Shirk*, 569, 573 (2), indicates that the initial page of the case is 569, that the page on which the point cited is found is 573, and that the point cited begins at the marginal indentation numbered 2.]

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18. *Bill of Exceptions.*—*Record.*—*Evidence.*—*Sufficiency.*—Where the evidence has not been made a part of the record on appeal, the Supreme Court cannot pass upon the sufficiency thereof. *Trombley v. State*, 231, 232 (1).
19. *Instructions.*—*Bill of Exceptions.*—Instructions saved by a special bill of exceptions duly signed and filed by the trial judge and showing the proper exceptions taken, are a part of the record. *Beery v. Driver*, 127, 129 (1).
20. *Bill of Exceptions.*—*Argument of Counsel.*—*Misconduct.*—*How Brought Into Record.*—The motion based upon alleged misconduct in the argument of counsel, the action of the court thereon and the exception thereto, may be brought into the record by a bill of exceptions or possibly by an order-book entry by virtue of the act of 1903 (Acts 1903, p. 338, §2, §641b Burns 1905). *Hasper v. Weitcamp*, 371, 374 (4).
21. *Original Bill of Exceptions.*—*Precipe.*—*Criminal Law.*—The original bill of exceptions in a criminal case is not a part of the record on appeal, where the precipe calls only for a transcript thereof. *State v. Thomson*, 96, 97 (1).
22. *Bill of Exceptions.*—*Original.*—*Transcript.*—*Precipe.*—*Statutes.*—The act of 1903 (Acts 1903, p. 338, §7), providing that the clerk may certify the original bill of exceptions instead of a transcript, though the precipe calls for a transcript, does not apply to criminal cases. *State v. Thomson*, 96, 97 (2).
23. *Bill of Exceptions.*—*Original.*—*Transcript.*—*Precipe.*—*Statutes.*—The act of 1905 (Acts 1905, pp. 584, 648, §289), providing that in appeals in criminal cases the original bill of exceptions may be included in a transcript, instead of a transcript thereof, as requested by the precipe, does not apply to a cause commenced before the taking effect of such act. *State v. Thomson*, 96, 98 (3).

APPEAL AND ERROR—Continued.

24. *Motion to Dismiss.—Whether in Record without Bill of Exceptions.—Statute.*—A motion to dismiss an appeal from the board of commissioners, the ruling thereon and exception thereto are in the record by virtue of §641c Burns 1905, Acts 1903, p. 338, §3, without a bill of exceptions.
Good v. Burk, 462, 467 (8).
25. *Record.—What Are Parts of.—Statutes.*—Under §641c Burns 1905, Acts 1903, p. 338, §3, the supplemental complaint, the action of the court in permitting its filing, and the objection and exception, are parts of the record without a bill of exceptions.
Schmoe v. Cotton, 364, 368 (5).
26. *Precipe.*—Where a precipe for a transcript calls for the entries on certain pages of the order-book, one of which is the final judgment, such judgment is a proper part of the transcript on appeal, though not called for in terms.
Hayes v. Shirk, 569, 574 (4).
27. *Transcript.—Precipe.—Presumptions.*—Where a precipe for a transcript calls for the entries on certain pages of the order-book, and the clerk embodies the final judgment in said cause in the transcript, the presumption is that such judgment was entered upon some of such pages.
Hayes v. Shirk, 569, 574 (5).
28. *Transcript.—Paragraphs of Complaint.—Erroneous Marginal Notes.*—Where the transcript correctly contained the questioned paragraphs of complaint, marginal notes on the transcript denominating them "amended" paragraphs do not affect the consideration thereof, such notes being no part of the record.
Hayes v. Shirk, 569, 575 (6).
29. *Transcript.—Precipe.—Statutes.—Construction.*—The act of 1903 (Acts 1903, p. 338, §7, §641g Burns 1905), prescribing rules concerning civil procedure, will be liberally construed.
Hayes v. Shirk, 569, 575 (7).
30. *Precipe.—Oral.—Presumptions.*—Where a transcript, without a written precipe therefor, is filed on appeal, the presumption is that appellants orally requested the same, an oral request being legally sufficient.
Price v. Huddleston, 536, 537 (1).
31. *Transcript.—Precipe.—Failure to Include Parts Called for.—Dismissal.*—That the transcript on appeal does not contain copies of all of the records and papers called for by the precipe, is not a ground for dismissal of the appeal.
Price v. Huddleston, 536, 538 (2).
32. *Transcript.—Omissions.—Precipe.—Certiorari.*—Where parts of the record below, specified in the precipe, are omitted from the transcript; or where parts are omitted which are necessary to appellee's cross-assignment of errors, or in showing that appellant's assignment is harmless, the same may be supplied by a writ of *certiorari*.
Price v. Huddleston, 536, 538 (3).
33. *Transcript.—Omissions.*—Where the transcript contains enough of the record to present the questions raised on appeal, alleged omissions of other parts called for are harmless.
Price v. Huddleston, 536, 539 (4).
34. *Briefs.—Whether Questioned Complaint Should be Inserted in Full.*—Only those parts of a questioned complaint which

APPEAL AND ERROR—Continued.

fully present the precise point at issue should be set out in the briefs on appeal, the only purpose being to present the precise question to the judges who do not have the record.

Hayes v. Shirk, 569, 575 (8).

35. *Briefs.—Statement of Complaint.*—Where the allegations of a questioned complaint are substantially set out in the brief, the sufficiency of such complaint will be considered.

Hayes v. Shirk, 569, 576 (9).

36. *Briefs.*—It is not necessary for appellant in his brief to set out causes in his motion for a new trial which are abandoned.

Pomeroy v. Wimer, 440, 449 (6).

37. *Briefs.—References to Transcript.*—Contentions as to the improper rulings of the trial-court in admitting evidence may not be considered, where the briefs fail to point out the pages and lines of the transcript where the same may be found.

Flint & Walling Mfg. Co. v. Beckett, 491, 504 (20).

Cleveland, etc., R. Co. v. Hayes, 454, 458 (7).

38. *Briefs.—Indictment.*—Where appellant fails to point out, in his brief or oral argument, any specific defect in an indictment, and the court fails to detect any, such indictment will be held good.

Sherrick v. State, 345, 352 (6).

39. *Supreme Court Rules.—Briefs.*—A failure by appellant to prepare his transcript as prescribed by rule 3 of the Supreme Court, and to prepare his brief according to rule 22, especially after objection has been made because thereof, is fatal to any questions sought to be presented by such appeal.

Tisdale v. State, 83, 84 (1).

40. *Supreme Court Rules.—Briefs.*—Appellant's brief will not be disregarded where a good-faith attempt has been made to comply with the Supreme Court rules and enough of the record has been set out to present the questions raised.

Howard v. Adkins, 184, 186 (1).

Huber Mfg. Co. v. Wagner, 98, 99 (1).

Ellison v. Ganiard, 471, 481 (1).

41. *Briefs.—Arrangement.*—Where the motion for a new trial and the instructions complained of are set out in a convenient place in the brief and an honest effort is shown to comply with the Supreme Court rules, such brief will be held sufficient.

Pomeroy v. Wimer, 440, 450 (7).

42. *Briefs.—Striking from Files.—Unprofessional Language.*—Briefs containing unprofessional language will be stricken from the files.

Shirk v. Hupp, 509, 515 (9).

43. *Briefs.—Omissions by Appellant.—Supply by Appellee.*—Where the necessary parts of the record to present the errors assigned are not set out in the appellant's brief, but the appellee's brief supplies same, such errors will be considered.

Adams v. Betz, 161, 164 (1).

44. *Briefs.*—Alleged errors not discussed in appellants' brief on appeal are waived.

Indianapolis, etc., Traction Co. v. Kidd, 402, 413 (16).

Trombley v. State, 231, 232 (2).

Hasper v. Weitcamp, 371, 373 (1).

45. *Briefs.*—Alleged errors on appeal, not mentioned by appellant in his statement of "points" in his brief, are waived and cannot be raised afterwards.

Schmoe v. Cotton, 364, 366 (1).

APPEAL AND ERROR—Continued.

46. *Briefs.—Evidence.*—Failure of appellant to set out in its brief on appeal the evidence or a condensed recital thereof waives any question thereon.
City of Richmond v. Lincoln, 468, 471 (3).
47. *Supreme Court Rules.*—Failure to comply with Supreme Court rule 22 is fatal to the consideration of the alleged error.
Todd v. Crail, 48, 57 (10).
48. *Contempt.—Indirect.—Examination of Parties.—Refusal.—Striking Out Complaint.—Exceptions.*—An exception to the "opinion and judgment of the court," assigned as error on appeal, in a case of indirect contempt, wherein the court struck out plaintiff's complaint under §521 Burns 1901, §513 R. S. 1881, for his refusal to be examined as a witness before trial, properly presents the question of the correctness of the court's ruling below.
McSwane v. Foreman, 171, 176 (5).
49. *Dismissal.—Affirmance.—Discretion of Court.*—Where the year within which an appeal may be taken has not expired, and appellant has failed to comply with the court rules in presenting his case on appeal, the Supreme Court may, in its discretion, dismiss the appeal instead of affirming the judgment.
Tisdale v. State, 83, 85 (2).
50. *Complaint.—Exhibits.—Estoppel.—Wills.—Contest.*—Where the contestant of a probated will is required, by an order of the court entered upon the contestees' motion, to make an exhibit of a former testator's will, they are estopped on appeal from maintaining that such will is not a part of the complaint.
Heaston v. Krieg, 101, 107 (1).
51. *Several Demurrer.—Single Exception.—Several Assignments.*—Where a several demurrer was filed and overruled to a complaint in three paragraphs "to which ruling of the court the defendant excepted," such exception relates to each paragraph and properly questions the sufficiency of each. *Whitesell v. Strickler*, ante, 602, followed.
City of Decatur v. McKean, 249, 253 (1).
52. *Exceptions.—When Several.*—An entry showing that the "court overrules the separate demurrer by each of the defendants to the amended complaint, * * * to which ruling of the court the defendants except," which entry was made pursuant to a ruling upon a demurrer in form: the defendants "each separately and severally demurs to plaintiff's complaint," etc., shows a several and not a joint exception by the defendants. *Noonan v. Bell*, 159 Ind. 329, and *Southern Ind. R. Co. v. Harrell*, 161 Ind. 689, overruled.
Whitesell v. Strickler, 602, 606 (1).
53. *Exceptions.—Assignment of Errors.*—Several assignments of errors on appeal present no questions where founded on a joint exception; and joint assignments present no questions where founded on several exceptions.
Whitesell v. Strickler, 602, 609 (5).
54. *Judgment.—Complaint.—Paragraphs.—One Insufficient.*—A judgment resting upon a complaint in three paragraphs, one of which is insufficient and to which a demurrer was overruled, will be reversed where it does not affirmatively appear that such judgment rests upon the good paragraphs.
City of Decatur v. McKean, 249, 260 (10).

APPEAL AND ERROR—Continued.

55. *Decisions.—Judgment.—Binding Force.—Election Commissioners.—Substantive Law.—Procedure.*—Appellees, the county board of election commissioners, are bound by the substantive law pronounced in the decision, on appeal, of a cause to which they were parties, though the judgment of the lower court in their favor was affirmed, such affirmance being occasioned by a mere matter of procedure.
State, ex rel., v. Board, etc., 276, 289 (14).
56. *Judgment Appealed From.—Legal Effect.*—An order or judgment which is vacated by an appeal is, in legal effect, no order or judgment.
Taylor v. Strayer, 23, 29 (5).
57. *Jurisdiction.—Judgment.—Superior Court.—Reversal.*—Where the superior court entered a decree on the merits for defendant in an equity case appealed from a city court having no jurisdiction over the subject-matter, the Supreme Court will remand said cause with an order to vacate such judgment and dismiss the suit.
Steinmetz v. G. H. Hammond Co., 153, 159 (9).
58. *Final Judgment.—Remanding Case to Board.*—An order of the circuit court sustaining a motion to remand a case back to the board of commissioners because the cause had been decided by two only of such commissioners, one of whom was a party thereto, is final, and an appeal lies therefrom.
Carr v. Duhme, 76, 79 (2).
59. *Interlocutory Orders.—Eminent Domain.—Interurban Railroads.—Railroads.—Crossings.*—Section 5464a Burns 1905, Acts 1903, p. 125, §1, giving a right of appeal from an order fixing the point of crossing of a steam railroad by an interurban railroad "in the same manner and under the same conditions and restrictions as provided by law in civil cases," does not suspend further proceedings in the court below; and an appeal from such order is governed by §659 Burns 1901, §647 R. S. 1881, providing for appeals to the Supreme Court from interlocutory orders.
Terre Haute, etc., R. Co. v. Indianapolis, etc., Co., 193, 196 (3).
60. *Final Judgments.—What Are.—Interurban Railroads.—Subsidies.—Elections.*—Final judgment by the board of commissioners, in case of action favorable to petitioners for an interurban railroad subsidy, is rendered only after an election, and consists in the granting of the prayer of the petition and the levying of the tax to pay such subsidy.
Good v. Burk, 462, 468 (10).
61. *Pleading.—Complaint.—Law of the Case.*—A reversal of a judgment sustaining a demurrer to a complaint necessarily settles plaintiff's right to judgment upon proof of the allegations of such complaint.
State, ex rel., v. Board, etc., 276, 288 (12).
62. *Revision of Judgments.—Power of Supreme Court.*—The general authority of the Supreme Court to review the judgments of lower courts necessarily includes the right to administer justice regardless of technicalities and arbitrary rules.
Aiken v. City of Columbus, 139, 151 (15).
63. *Decisions.—Right to Annex Conditions.*—The Supreme Court has the right, in order to administer justice, to mould its de-

APPEAL AND ERROR—Continued.

cisions so that proper amendments may be made or pleadings be filed below, and the merits of the case determined.

Aiken v. City of Columbus, 139, 152 (16).

64. *Defective Complaint.—Negligence.—Limitation of Actions.—Affirmance.*—A judgment for defendant on demurrer to a complaint, technically bad, will be affirmed, where the statute of limitations has not barred a new action for the same cause.

Aiken v. City of Columbus, 139, 152 (17).

65. *Jurisdiction.—Raising Question for First Time in Supreme Court.*—An objection for want of jurisdiction may be raised for the first time in the Supreme Court.

Steinmetz v. G. H. Hammond Co., 153, 159 (8).

66. *Parties.—Jurisdiction.—Suggestion of Want of.*—Where the parties to the action below are not made parties on appeal, the Supreme Court has no jurisdiction; and the suggestion of a want of jurisdiction requires a consideration of such question.

Carr v. Duhme, 76, 78 (1).

67. *Jurisdiction.*—A motion to dismiss an appeal for want of jurisdiction requires the initial consideration of the court.

Polk v. Johnson, 548, 551 (1).

68. *Assignment of Errors.—Parties.—Jurisdiction.—Waiver.*—Where a defendant in a representative capacity below is made an appellee, on appeal, in his personal capacity, but his attorneys accepted service of notice of the appeal and filed a brief on the merits, he waived his right to object to the jurisdiction of his person on appeal.

Foley v. O'Donaghue, 134, 135 (1).

69. *Record.—Motion for New Trial.—Bill of Exceptions.*—A motion for a new trial, contained only in the bill of exceptions in the transcript on appeal, is not a part of the record; and error assigned on the overruling of same cannot be considered.

Wurfel v. State, 160.

Wurfel v. State, 191, 192 (2).

71. *Reversal.—When New Trial Ordered.*—Where justice requires, a new trial will be ordered, though appellant may be technically entitled to judgment on the special findings.

Bemis Indianapolis Bag Co. v. Krentler, 653, 659 (6).

Donaldson v. State, ex rel., 553, 558 (5).

Farmers, etc., Ins. Assn. v. Stewart, 544, 548 (8).

72. *New Trial.—“Findings.”—Words and Phrases.*—The use of the word “findings” instead of “decision” in the motion for a new trial is a sufficient compliance with subd. 6, §568 Burns 1901, §559 R. S. 1881, providing reasons for which new trials may be granted.

Ellison v. Ganiard, 471, 481 (2).

73. *New Trial.—Instructions.—Joint Assignment.*—Where three instructions are jointly assigned as a reason for a new trial, error cannot on appeal be predicated upon one of them only.

Cleveland, etc., R. Co. v. Hayes, 454, 460 (10).

74. *New Trial.—Evidence.—Sufficiency.—How Considered.*—In passing upon the sufficiency of the evidence on appeal only the theory most favorable to the successful party will be considered.

Cleveland, etc., R. Co. v. Hayes, 454, 460 (11).

APPEAL AND ERROR—Continued.

75. *Railroads.—Interlocking Devices.—Statutes.*—An appeal from a decision in a suit to revise and review the action of the railroad commission, brought under the act of 1905 (Acts 1905, p. 83, §6, §5405f Burns 1905), if such a suit can be maintained, lies to the Appellate Court and not to the Supreme Court.

Grand Trunk, etc., R. Co. v. Railroad Com., etc., 261, 262 (1).

76. *Rehearing.—New Questions.*—Parties, on appeal, cannot raise new questions on a petition for a rehearing.

Pomeroy v. Wimer, 440, 449 (5).

77. *Transfer.—New Questions.—How Presented.*—In a petition to transfer a cause from the Appellate to the Supreme Court on the ground that a new question of law was involved and decided erroneously, the Supreme Court will not search the record to ascertain such new questions, but will look only to the decision of the Appellate Court for the facts and the application of the law thereto.

Grand Rapids, etc., R. Co. v. Railroad Com., etc., 214, 216 (1).

78. *Transfer.—Railroads.—Interlocking Devices.*—The decision of the Appellate Court that no appeal lies to such court, under the act of 1905 (Acts 1905, p. 83, §6), from an order of the railroad commission in relation to interlocking devices at a railroad crossing as provided by the act of 1897 (Acts 1897, p. 237), is correct.

Grand Rapids, etc., R. Co. v. Railroad Com., etc., 214, 216 (2).

79. *Appellate Court.—Constitutional Law.—Transfer.—Railroad Commission.*—No appeal lies to the Supreme Court from any order of the railroad commission.

Grand Rapids, etc., R. Co. v. Railroad Com., etc., 214, 216 (3).

80. *Transfer.—Want of Jurisdiction.*—An appeal taken from an order of the railroad commission to the Appellate Court, where no appeal lies to either the Appellate or Supreme Courts, will not be transferred to the Supreme Court.

Grand Rapids, etc., R. Co. v. Railroad Com., etc., 214, 217 (4).

81. *Transfer.—Jurisdiction.*—Where an appeal is taken to the Supreme Court and jurisdiction is in the Appellate Court, such appeal will be transferred to the Appellate Court.

Grand Trunk, etc., R. Co. v. Railroad Com., etc., 261, 262 (2).

82. *Parties.—Devises.—Abatement and Revival.*—Where a party to a proceeding for the establishment of a drain dies after judgment but before appeal, her devisees or heirs must be made parties to the assignment of errors on appeal.

Laporte Land Co. v. Morrison, 73, 74 (1).

83. *Parties.—Abatement and Revival.—Executors and Administrators.—Judgment.—Costs.*—The executor of the estate of a testate party to a ditch proceeding, in whose favor a judgment for costs had been rendered, is a proper party, together with the devisees, to the assignment of errors in such cause on appeal, the party having died after judgment and before appeal.

Laporte Land Co. v. Morrison, 73, 75 (2).

APPEAL AND ERROR—Continued.

84. *Parties.—Death.—Jurisdiction.*—The Supreme Court has no jurisdiction of a cause on appeal where a party to the judgment below died before such appeal was taken, and her proper representatives were not made parties to the assignment of errors.
Laporte Land Co. v. Morrison, 73, 76 (3).
85. *Vacation.—Parties.—Dismissal.*—Where all of the parties to the judgment below are not made parties on a vacation appeal, the Supreme Court has no jurisdiction, and the appeal will be dismissed.
Laporte Land Co. v. Morrison, 73, 76 (4).
86. *Parties.—Receivers.—Owners.*—The owner, from whose possession his property is taken by a receiver duly appointed by the court, has a right of appeal from an order making an allowance from the proceeds of such property for the services of such receiver.
Polk v. Johnson, 548, 551 (2).
87. *Parties.—Vacation Appeal.—Dismissal.*—A vacation appeal from an allowance made by the court to a receiver for his services, taken by the former owner of the property involved in such receivership, will be dismissed where the receiver was not made a party thereto.
Polk v. Johnson, 548, 551 (3).
88. *Parties.—Substitution of, After Period for Appeal Has Elapsed.*—Necessary parties to a vacation appeal, omitted from the notices of appeal and from the assignment of errors, cannot, with or without their consent, be substituted after the year for perfecting the appeal has elapsed, since there is a want of jurisdiction.
Polk v. Johnson, 548, 552 (5).
89. *Assignments of Errors.—Names of Parties.*—An assignment of errors setting out the full names of all the parties appellant and alleging that they were the same parties, who were petitioners below, is good, though some of their Christian names below were signed only by initial, and in some instances only the partnership names were used.
Good v. Burk, 462, 464 (1).
90. *Interurban Railroads.—Names of Parties.—Failure to Object.—Waiver.*—A failure of a remonstrant, in an interurban railroad subsidy proceeding, to object in the trial court to names of the petitioners, which were signed in some cases by the surnames and initials only of the Christian names, and in other cases by partnership names only, is a waiver of the right to question same on appeal.
Good v. Burk, 462, 466 (5).
91. *Vacation Appeal.—Parties.—Assignment of Errors.*—Where one of two joint judgment defendants appeals and does not make his codefendant a party to the assignment of errors, the appeal will be dismissed, though notice of such appeal was served on such codefendant.
Haag v. Deter, 126.
92. *Initial Attack on Appeal.*—Under §346 Burns 1901, §343 R. S. 1881, a defendant may question the sufficiency of the complaint for the first time on appeal.
Indianapolis St. R. Co. v. Ray, 236, 239 (1).
93. *Complaint.—Sufficiency.—Initial Attack on Appeal.*—A complaint, attacked for the first time on appeal, is sufficient unless there is a total absence of some essential allegation, mere uncertainty or inadequacy of averment, such as might have been amended upon motion, being insufficient to render such complaint bad.
Indianapolis St. R. Co. v. Ray, 236, 239 (2).

APPEAL AND ERROR—Continued.

94. *Complaint.—Initial Attack on Appeal.—Evidence.—Verdict.*
—A complaint, attacked for the first time on appeal, is sufficient if it will bar another action for the same cause, mere defects therein being cured by the evidence and verdict.
Indianapolis Traction, etc., Co. v. Kidd, 402, 405 (1).
95. *Reversal.—Errors.*—Where a judgment is reversed, the Supreme Court will not decide alleged errors not likely to arise again.
City of Indianapolis v. Keeley, 516, 528 (21).
96. *Record.—Trial.—Decisions.*—The trial of a cause upon appeal is by the record and not by briefs or argument of counsel.
State, ex rel., v. Board, etc., 276, 287 (9).
97. *Error.—How Shown.—Searching for, Though Not Pointed Out.*—The Supreme Court will not look beyond appellant's brief to ascertain errors for reversal, but may search the record to sustain the judgment, though appellee should file no brief.
State, ex rel., v. Board, etc., 276, 288 (11).
98. *Supreme Court Rules.—Error in Record.—How Shown.*—Error, to be available on appeal, must be properly saved in the trial court and presented in the Supreme Court according to the rules of practice therein prescribed.
State, ex rel., v. Board, etc., 276, 287 (10).
99. *Evidence.—Opinions.—Damages.*—A judgment should not be reversed merely because some of the witnesses gave an opinion as to plaintiff's damage instead of stating the value of the land before and after the injury.
Schmoe v. Cotton, 364, 370 (11).
100. *Supplemental Complaint.—Failure to Prove.—Effect.*—The plaintiff's failure to prove the allegations of his supplemental complaint does not constitute a reversible error, where the judgment is right on the original complaint.
Schmoe v. Cotton, 364, 370 (12).
101. *Evidence.—Exclusion.—Objection.—Changing Grounds of, on Appeal.*—An objection, on appeal, that the form of an excluded question was bad, will not be heard, where the only objection below was that such evidence "was not material."
Spaulding v. Mott, 58, 72 (15).
102. *Erroneous Instructions.—Procured by Appellant.*—Defendant may not complain of erroneous instructions given at its request.
Indianapolis Traction, etc., Co. v. Kidd, 402, 413 (17).
103. *Instructions.—Misleading.—Reversible Error.*—The giving of a material misleading instruction is reversible error.
Lake Erie, etc., R. Co. v. Ford, 205, 213 (9).
104. *Erroneous Instructions.—When Reversible.*—Where an erroneous instruction is not corrected or cured by another instruction, and it is impossible to tell whether it injured defendant, the judgment will be reversed.
Indianapolis St. R. Co. v. Ray, 236, 248 (22).
105. *Complaint.—Sufficiency.—Conclusions of Law.—Exceptions.—Same Questions Presented.*—Where the special findings show the same facts as alleged in the cross-complaint a decision on the exception to the conclusions of law renders unnecessary a decision on the sufficiency of such cross-complaint.
Ditchey v. Lee, 267, 269 (1).

APPEAL AND ERROR—Continued.

106. *Pleading. — Demurrer. — Right Result.*—Where the trial court in its rulings on the pleadings reaches a right result, the judgment will not be disturbed.
City of Huntington v. Amiss, 375, 381 (8).
107. *Technicalities.—Merits.*—Where the decision of the trial court was technically right, but wrong on the merits, the Supreme Court will ordinarily decide the case on the merits, especially where the merits of the case must be tried again in the lower court.
Aiken v. City of Columbus, 139, 151 (14).
108. *Theory of Trial Court.—Abandonment of, on Appeal.*—The parties to a cause on appeal will be held to the theory upon which the cause was tried below.
Donaldson v. State, ex rel., 553, 558 (4).
109. *Trial Procedure.—Construction.*—Strict construction of the rules of procedure is ordinarily applied to determine the questions ruled upon by the trial court, but where two or more parties join in the same pleadings a liberal construction prevails to determine the rights of the parties therein.
Whitesell v. Strickler, 602, 609 (6).
110. *Stare Decisis.—Conflict.*—Where the authorities on a question of law are conflicting, the Supreme Court will adopt the rule which seems the most fair, reasonable and just.
Glens Falls Ins. Co. v. Michael, 659, 699 (19).
111. *Weighing Evidence.—Quieting Title.—Jury.*—The Supreme Court will not, under §641h Burns 1905, Acts 1903, p. 338, §8, weigh the evidence in a quiet-title case, since such case is triable by jury.
Adams v. Betz, 161, 164 (2).
112. *Weighing Evidence.*—The Supreme Court can disturb a judgment on the ground of insufficiency of the evidence, only where there is a total failure of the evidence to support some material point of the case.
Indianapolis Traction, etc., Co. v. Klentschy, 598, 600 (2).
113. *Weighing Evidence.*—The Supreme Court will not disturb a verdict where the evidence was conflicting.
Price v. Huddleston, 536, 544 (11).
Tinkle v. Wallace, 382, 394 (17).
Indianapolis Traction, etc., Co. v. Kidd, 402, 415 (19).
Hasper v. Weitcamp, 371, 375 (8).

APPELLATE COURT—

See COURTS.

ARGUMENT OF COUNSEL—

- New trial for misconduct in, see NEW TRIAL, 1, 2; *Hasper v. Weitcamp*, 371, 373 (2), 374 (3).
- Misconduct in, how question saved, see TRIAL, 2; *Hasper v. Weitcamp*, 371, 374 (5); APPEAL AND ERROR, 20; *Hasper v. Weitcamp*, 371, 374 (4).

ARREST—

Motion in, see PLEADING, 44.

ASSAULT AND BATTERY—

See CRIMINAL LAW.

In reasonable self-defense, death resulting, constitutes homicide by misadventure, see HOMICIDE, 2; *Weston v. State*, 324, 327 (2).

Resulting in death constitutes manslaughter, see HOMICIDE, 1; *Weston v. State*, 324, 326 (1).

ASSAULT AND BATTERY WITH INTENT—

See INDICTMENT AND INFORMATION, 1; *Padgett v. State*, 179, 180 (1).

ASSUMPSIT—

Origin, see TORTS, 6; *Flint & Walling Mfg. Co. v. Beckett*, 491, 499 (6).

Negligent breach of contract entitles plaintiff to an action in, or in tort, at his election, see TORTS, 3; *Flint & Walling Mfg. Co. v. Beckett*, 491, 498 (3).

ATTORNEY AND CLIENT—

Attorneys' fees in foreclosure of street assessments, recoverable, see MUNICIPAL CORPORATIONS, 34; *Shirk v. Hupp*, 509, 514 (7).

Admissions of attorney, not admissible against client, see EVIDENCE, 3; *Spurgeon v. Rhodes*, 1, 10 (7).

Appointment of attorney as special judge, see COURTS, 5-10; *Juliana v. State*, 421.

Disclosures to, Before Employment.—*Confidential Character of.*—Disclosures made by defendant's wife to an attorney, with a view to his employment, are confidential and privileged.
Juliana v. State, 421, 425 (5).

ATTORNEYS-GENERAL—

As to assistants, see OFFICERS, 1-6; *Hord v. State*, 622.

Power to contract on behalf of State, see OFFICERS, 1-6; *Hord v. State*, 622.

AUDITOR OF STATE—

See OFFICERS.

As to duties and liabilities, see OFFICERS, 7-12; *Sherrick v. State*, 345.

AWARDS—

See EMINENT DOMAIN.

BANKRUPTCY—

Of joint debtor does not preclude suit to set aside other joint debtor's fraudulent conveyance, see FRAUDULENT CONVEYANCES, 3; *Stark v. Lamb*, 642, 645 (3).

Trustee in, cannot assert an estoppel, personal to a creditor, see ESTOPPEL, 2; *Ellison v. Ganiard*, 471, 490 (10).

Does not affect property held in trust by bankrupt, see TRUSTS, 4; *Ellison v. Ganiard*, 471, 488 (6).

BANKRUPTCY—Continued.

1. *Trustees.—Title to Property.—Equities.*—Trustees in bankruptcy take their bankrupts' titles, which are unaffected by fraud, burdened with all the equities to which such titles were subject in the hands of such bankrupts.
Ellison v. Ganiard, 471, 488 (7).
2. *Title.—Unrecorded Trust.—Trustee's Right to Quiet Title.—Estoppel in Pais.*—A trustee in bankruptcy has no right to a decree quieting his title to lands held in trust by the bankrupt by an unrecorded instrument, the deed to such bankrupt on record appearing absolute, because of an estoppel *in pais*, where but two out of 800 of the creditors relied upon the bankrupt's ownership of such property when they became creditors.
Ellison v. Ganiard, 471, 489 (9).

BANKS AND BANKING—

Regulation of, by State, see CONSTITUTIONAL LAW, 1-9; *State v. Richcreek*, 217.

Construction of statutes relating thereto, see STATUTES, 3, 4; *State v. Richcreek*, 217, 228 (11), 229 (14).

1. *Regulation of, by State.—Common-Law Right.*—Any person had the right, at common law, to engage in any department of the banking business, but such right may be regulated or restrained by the State.
State v. Richcreek, 217, 221 (1).
2. *Regulation.—Police Power.—Constitutional Limitations.*—The banking business is subject to inspection and control by the State under the exercise of the police power, subject only to the limitations of the Constitution.
State v. Richcreek, 217, 222 (2).
3. *Regulation.—Legislative Questions.—Constitutional Limitations.*—The question of proper and needful regulations of the banking business is primarily for the legislature, whose action is subject to review by the courts only when in violation of the Constitution.
State v. Richcreek, 217, 222 (3).
4. *Character of Business.—Regulation.*—The banking business being of a quasi-public nature, the character of governmental supervision is largely a matter of legislative discretion.
State v. Richcreek, 217, 229 (12).

BICYCLES—

Riding of, on sidewalks, does not render city liable for injuries done, see MUNICIPAL CORPORATIONS, 24-29; *Millett v. City of Princeton*, 582.

BILL OF PARTICULARS—

See CRIMINAL LAW, 2-5; *Sherrick v. State*, 345.

BILLS AND NOTES—

See CONTRACTS.

Title to, must be proved as alleged, see TRIAL, 3; *Digan v. Mandel*, 586, 591 (6).

Burden of proving alterations in, upon defendant, see TRIAL, 6; *Digan v. Mandel*, 586, 593 (10).

Reply of *res judicata* in actions upon, see PLEADING, 34-38; *Johnson v. Knudson-Mercer Co.*, 429.

BILLS AND NOTES—Continued.

Complaint on note made payable to wrong payee, see PLEADING, 1, 2; *Digan v. Mandel*, 586, 590 (1), (2).

Real payee, though not nominal, may maintain action on, see PARTIES, 1; *Digan v. Mandel*, 586, 594 (12).

Where payment is pleaded, evidence of existence of mortgage on maker's home is admissible for plaintiff in denial, see EVIDENCE, 31; *Hasper v. Weitcamp*, 371, 375 (6).

Introduction of, in evidence, preliminary proof necessary, see EVIDENCE, 1; *Digan v. Mandel*, 586, 593 (9).

1. *Insertion of Wrong Person as Payee.—Indorsement.*—Where, by mistake, the name of a bank was inserted as the payee of a note intended to be executed to plaintiff, such bank never acquired any interest in such note.

Digan v. Mandel, 586, 590 (3).

2. *Mistaken Payee.—Indorsement.—Parties.*—The indorsement of a note by the nominal payee, whose name was inserted by mistake, to the real payee does not constitute such nominal payee an assignor within §277 Burns 1901, §276 R. S. 1881, and, even in the absence of an indorsement, such nominal payee is not a necessary party to an action by the real payee to enforce such note.

Digan v. Mandel, 586, 591 (4).

3. *Delivery.—Signatures.*—Delivery of a note is a material element in the execution thereof, and when the execution of a note is denied, proof of such delivery as well as the signing thereof is necessary.

Digan v. Mandel, 586, 592 (7).

4. *Delivery.—What Constitutes.*—Delivery of a note is shown, where such acts are proved as show an unmistakable intention on the part of the maker to relinquish all power and control over it and give it effect in the hands of the payee.

Digan v. Mandel, 586, 592 (8).

5. *Delivery. — Evidence. — Possession. — Presumptions.*—Possession of a note signed by decedent and nominally payable to a third party, by whom it was indorsed to plaintiff, such third party disclaiming title thereto at any time, does not sustain an inference or presumption of delivery of such note, where the execution of such note is denied. *Taylor v. Gay*, 6 Blackf. 150, disapproved.

Digan v. Mandel, 586, 595 (13).

6. *Mistake.—Evidence.*—Where plaintiff alleged that, by mistake, a third party was named as the payee of a note intended to be executed to plaintiff, proof of such third party's indorsement of such note to plaintiff and that such third party never had title thereto, does not sustain a finding that such maker inserted, by mistake, such payee's name instead of plaintiff's.

Digan v. Mandel, 586, 597 (14).

BILLS OF EXCEPTIONS—

See APPEAL AND ERROR.

BOARDS OF COMMISSIONERS—

See HIGHWAYS.

Appeals from in interurban railroad election cases, see APPEAL AND ERROR, 10, 11; *Good v. Burk*, 462, 466 (7), 467 (9).

On appeals from, only issues raised before board may be litigated, see TRIAL, 10; *Taylor v. Strayer*, 23, 29 (7).

BOARDS OF COMMISSIONERS—Continued.

Have jurisdiction over highway proceedings when proper notices are posted, see JURISDICTION, 1; *Todd v. Crail*, 48, 52 (1).

Judgments where members are interested, see COURTS, 1-4; *Carr v. Duhme*, 76.

Judicial Capacity.—Vacation of Streets and Alleys.—A board of commissioners in deciding upon a petition under §4229 Burns 1901, Acts 1893, p. 44, for the vacation of the streets and alleys in a plat of land disannexed by a municipal corporation, acts in a judicial capacity. *MacGinnitie v. Silvers*, 321, 324 (4).

BONDS—

See REPLEVIN.

BOUNDARIES—

See DEEDS; EVIDENCE, 13; PARTITION; QUIETING TITLE.

May be agreed upon by parol contract, see PARTITION; *Adams v. Betz*, 161, 169 (7).

BRIBERY—

See ELECTIONS.

Of voters, see EVIDENCE, 7-12; *Tinkle v. Wallace*, 382.

Meaning of, see WORDS AND PHRASES, 5; *Tinkle v. Wallace*, 382, 386 (3).

BRIEFS—

See APPEAL AND ERROR, 34-47.

BURDEN OF PROOF—

See TRIAL.

CARE AND SUPPORT—

See WILLS, 9, 18.

CARRIERS—

See CONSTITUTIONAL LAW, 13-15; INTERURBAN RAILROADS; PLEADING; STREET RAILROADS.

1. *Express Companies.—Rates.—Common-Law Duties.*—At the common law express companies were under no obligation to treat all customers alike.

American Express Co. v. Southern Ind. Express Co., 292, 311 (4).

2. *Express Companies.—Prepayment of Charges.—Waiver.—Statutes.*—Section 3312b Burns 1901, Acts 1901, p. 149, §1, does not compel defendant express company to prepay charges on packages received from other companies, but does require defendant to do so for plaintiff, where it does so for other express companies, defendant's prepayment as to the others being a waiver of its right to refuse to prepay for plaintiff's packages.

American Express Co. v. Southern Ind. Express Co., 292, 311 (6), 313 (6).

3. *Gratuitous Carriage.—Negligence.—Contracts.*—Carriers may contract against liability for negligence in the gratuitous carriage of passengers.

Indianapolis Traction, etc., Co. v. Klentschy, 598, 601 (5).

CARRIERS—Continued.

4. *Street Railroads.—Passengers Alighting from Moving Train.—Contributory Negligence.*—The question of the contributory negligence of a woman who, on account of the crowded condition of a street car, sat on an improvised seat in the rear doorway and who stepped on the lower step as the car was coming to a stop and was thrown therefrom by a sudden start, is for the jury. *Wabash River Traction Co. v. Baker*, 262, 264 (1).

CASES—

For table of cases cited, see p. vi.

DISAPPROVED:

- Anderson v. Citizens St. R. Co.*, 12 Ind. App. 194, see *Wabash River Traction Co. v. Baker*, 262, 265 (2).
Geiss v. Franklin Ins. Co., 123 Ind. 172, see *Glens Falls Ins. Co. v. Michael*, 659, 705 (4).
Taylor v. Gay, 6 Blackf. 150, see *Digan v. Mandel*, 586, 595 (13).

DISTINGUISHED:

- Crow v. Judy*, 139 Ind. 562, see *Spaulding v. Mott*, 58, 70 (11).
Gipson v. Heath, 98 Ind. 100, see *Spaulding v. Mott*, 58, 70 (11).
Greensburgh, etc., Turnpike Co. v. Sidener, 40 Ind. 424, see *Spaulding v. Mott*, 58, 68 (10).
La Fayette Agricultural Works v. Phillips, 47 Ind. 259, see *Price v. Huddleston*, 536, 540 (5).
Yeoman v. Shaeffer, 155 Ind. 308, see *Beery v. Driver*, 127, 129, (2).

FOLLOWED:

- Adams Express Co. v. State*, 161 Ind. 328, see *American Express Co. v. Southern Ind. Express Co.*, 292, 308 (1), and *American Express Co. v. State*, 319, 320 (2).
Aiken v. City of Columbus, ante, 139, see *City of Richmond v. Lincoln*, 468, 470 (1).
American Express Co. v. Southern Ind. Express Co., ante, 292, see *American Express Co. v. State*, 319, 320 (2).
Cain v. Allen, 168 Ind. —, see *Jones v. Alexander*, 395, 398 (3), *Lanham v. Woods*, 398, 400 (1), and *Kunkle v. Abell*, 434, 436 (1).
Clemans v. Hatch, 168 Ind. —, see *City of Huntington v. Amiss*, 375, 379 (4).
Stuckwisch v. Kamman, 166 Ind. 672, see *Foley v. O'Donaghue*, 134, 137 (4).
Whitesell v. Strickler, ante, 602, see *City of Decatur v. McKean*, 249, 253 (1).

OVERRULED:

- Noonan v. Bell*, 159 Ind. 329, see *Whitesell v. Strickler*, 602, 606 (1).
Southern Ind. R. Co. v. Harrell, 161 Ind. 689, see *Whitesell v. Strickler*, 602, 606 (1).

CERTIORARI—

Writ of, to correct transcript, on appeal, see **APPEAL AND ERROR**, 32; *Price v. Huddleston*, 536, 538 (3).

CHANGE OF VENUE—

See **TRIAL**.

CITIES—

See MUNICIPAL CORPORATIONS.

CITY TREASURERS—

Should refuse to pay orders not signed by the mayor, see MUNICIPAL CORPORATIONS, 19; *City of Decatur v. McKean*, 249, 258 (8).

COLLATERAL ATTACK—

See JUDGMENT.

COMMERCE—

Interstate.—What is.—State laws which may to some extent affect interstate commerce are not necessarily bad on the ground that they regulate interstate commerce.

American Express Co. v. Southern Ind. Express Co., 292, 313 (9).

COMMON LAW—

Insufficiency of, to Meet Modern Requirements.—While, formerly, the common law was elastic enough to provide a remedy for flagrant injustice, it has not in modern times kept abreast of progress; and the legislature has been compelled to supply new remedies to meet existing conditions.

American Express Co. v. Southern Ind. Express Co., 292, 311 (5).

COMPETITION—

Public Policy.—Common Law.—All usages, customs, rules and practices designed to prevent competition are contrary to public policy and were condemned by the common law.

American Express Co. v. Southern Ind. Express Co., 292, 312 (7).

COMPLAINT—

See PLEADING.

CONDEMNATION—

See EMINENT DOMAIN.

CONFISCATION—

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CONSTITUTIONAL LAW—

See ELECTIONS.

Statute providing for recovery of attorney fee in street assessment foreclosing suits, constitutional, see MUNICIPAL CORPORATIONS, 34; *Shirk v. Hupp*, 509, 514 (7).

As related to acts of railroad commission, jurisdiction in Appellate Court, see APPEAL AND ERROR, 79; *Grand Rapids, etc., R. Co. v. Railroad Com., etc.*, 214, 216 (3).

Question of, will not be decided in an appeal taken without authority, see APPEAL AND ERROR, 15; *Good v. Burk*, 462, 468 (11).

1. *Confiscation of Property.—Eminent Domain.*—Article 1, §21, of the Indiana Constitution, providing that "no man's property shall be taken by law without just compensation," applies only

CONSTITUTIONAL LAW—Continued.

to the taking of specific pieces of private property by the exercise of the power of eminent domain.

State v. Richcreek, 217, 223 (4).

2. *Confiscation of Property.—Police Power.*—Article 1, §21, of the Indiana Constitution, providing that "no man's property shall be taken by law without just compensation" does not apply to the exercise of the police power by which the use of property, once lawful, may be restricted or entirely forbidden, thus destroying the value of such property, without compensation and without the fault of the owner.

State v. Richcreek, 217, 223 (5).

3. *Special Privileges.—Banks and Banking.*—The act of 1905 (Acts 1905, p. 182), regulating the business of banking by persons, partnerships and unincorporated persons, does not grant special privileges in violation of article 1, §23, of the Indiana Constitution, since there appears no manifest intent to discriminate in favor of one class and against another class, such business being open to all on like terms.

State v. Richcreek, 217, 224 (6).

4. *Banks.—Special Privileges.—Due Process.*—The banking act of 1905 (Acts 1905, p. 182) requiring that not more than one-third of the capital of unincorporated banks shall be invested in furniture and fixtures, though it may incidentally inflict hardships and loss to some, applies to all persons alike under the same circumstances, and does not deprive any persons of their property without due process of law in violation of the fourteenth amendment of the federal Constitution.

State v. Richcreek, 217, 224 (7).

5. *Due Process of Law.—Police Power.*—The fourteenth amendment of the Constitution of the United States does not apply to the exercise of the police power by the states, though the exercise of such power may inflict injury upon certain citizens more than others, where its exercise is calculated to promote the general health, morals, peace, education, or general welfare.

State v. Richcreek, 217, 225 (8).

6. *Due Process of Law.—Property.—Implied Obligations Concerning.*—The owner of property under our government holds it under the implied obligation that the use of same shall not be injurious to the community.

State v. Richcreek, 217, 227 (9).

7. *Banks and Banking.—Requiring Cash Capital.*—The banking act of 1905 (Acts 1905, p. 182) requiring the owners of unincorporated banks to invest at least \$10,000 in the business, not more than one-third of which may be invested in the banking outfit, the balance to remain in cash, does not violate article 1, §21, of the Constitution, inhibiting confiscation, or article 1, §23, thereof, inhibiting class legislation, or the fourteenth amendment of the federal Constitution guaranteeing due process of law.

State v. Richcreek, 217, 228 (10).

8. *Banks and Banking.—Capital Invested.—Liability.*—The act of 1905 (Acts 1905, p. 182, §3) requiring owners of unincorporated banks to certify to the Auditor of State that they are worth at least double the amount of capital paid into such banks does not violate article 1, §21, of the Constitution, inhibiting confiscation, or article 1, §23, thereof, inhibiting class legislation, or the fourteenth amendment of the federal Constitution guaranteeing due process of law.

State v. Richcreek, 217, 229 (13).

CONSTITUTIONAL LAW—Continued.

9. *Arbitrary Power.*—The legislature cannot exercise purely arbitrary power even in the exercise of the police power; and the power exercised cannot be supervised nor declared invalid unless it conflicts with some constitutional guaranty.
State v. Richcreek, 217, 230 (15).
10. *Contracts.—Impairment.*—The protection of the federal Constitution does not extend to contracts until they are created.
Hord v. State, 622, 642 (9).
11. *Courts.—Judges.—Parties.*—No judge can decide his own case; and a statute giving him such right is unconstitutional.
Carr v. Duhme, 76, 79 (4).
12. *Elections.—Candidates.—Disqualification.*—The constitutional provision (Art. 2, §6), disqualifying from holding office any candidate bribing or offering to bribe an elector, is self-executing and needs no legislative enactment to carry it into effect.
Tinkle v. Wallace, 382, 389 (7).
13. *Carriers.—Express Companies.—Refusal to Receive Packages from Others.*—The act of 1901 (Acts 1901, p. 149, §§3312b-3312f Burns 1901), requiring express carriers within this State to treat all consignors, including other express companies, on equal terms, and not to grant unequal privileges to any, is constitutional. *Adams Express Co. v. State*, 161 Ind. 328, and *American Express Co. v. Southern Ind. Express Co.*, ante, 292, followed.
American Express Co. v. State, 319, 320 (2).
14. *Fourteenth Amendment.—Statutes.—Carriers.—Express Companies.*—Sections one and four of the act of 1901 (Acts 1901, p. 149, §§3312b, 3312e Burns 1901), providing for the equal treatment of express companies by one another in this State, and for penalties for failure or refusal by any such companies to treat others on equal terms, are not in violation of the fourteenth amendment of the federal Constitution, providing for equal rights and for due process of law. *Adams Express Co. v. State*, 161 Ind. 328, followed.
American Express Co. v. Southern Ind. Express Co., 292, 308 (1), 313 (1).
15. *Carriers.—Express Companies.—Discrimination.*—Sections one and four of the act of 1901 (Acts 1901, p. 149, §§3312b, 3312e Burns 1901), providing for equal treatment by express companies of one another in this State and for a penalty for a violation of the provisions thereof, are not in violation of the federal Constitution, article 1, §8, providing that the federal Congress shall regulate interstate commerce, or section one of the fourteenth amendment, or article 1, §§21, 23, of the state Constitution, providing for equal rights and due process of law.
American Express Co. v. Southern Ind. Express Co., 292, 315 (13).
16. *Statutes.—Titles.—Gravel Roads.—Construction.—Bids.—Affidavits of Non-Collusion.*—The title of the act of 1899 (Acts 1899, p. 170), providing for the "letting of contracts for the building of court-houses, jails, county or township buildings, bridges, and monuments," does not cover a provision in such act requiring contractors for the construction of free gravel roads to file affidavits of non-collusion, since the construction of such roads is not provided for in such title, nor is it a "matter properly connected therewith," as required by article 4, §19, of the Constitution.
State v. Dorsey, 199, 204 (5).

CONSTITUTIONAL LAW—Continued.

17. *Gravel Roads.—Taxing Districts.—Special Privileges.—Class Legislation.*—The gravel road act of 1903 (Acts 1903, p. 255), providing that taxing districts for the construction of such roads shall extend two miles from such improvement, is not unconstitutional as against article 1, §23, of the bill of rights, providing for equality of privileges for all citizens, because it may compel persons living close to the boundaries of counties to pay a greater share in the construction of such gravel roads built near county lines. *Spaulding v. Mott*, 58, 66 (6).
18. *Public Improvements.—Taxing Districts.—Legislative Discretion.*—The legislature has a discretionary power to fix the boundaries of the districts to be taxed for the cost of public improvements located therein. *Spaulding v. Mott*, 58, 67 (7).
19. *Intoxicating Liquors.—Licenses.*—The act of 1897 (Acts 1897, p. 253) amending certain sections of the act of 1875 (Acts 1875 [s. s.], p. 55), and making it unlawful to retail in quantities of less than five gallons at a time, and exempting wholesalers who sell in quantities of five gallons or more at a time, is not unconstitutional as class legislation. *State v. Bock*, 559, 564 (4).
20. *Intoxicating Liquors.—License.—Remonstrance.*—The act of 1905 (Acts 1905, p. 7, §7283i Burns 1905), providing for the prevention of the granting of a license in townships or city wards by the filing of a remonstrance by a majority of the voters of such townships or city wards, is constitutional. *Cain v. Allen*, 168 Ind. —, followed. *Kunkle v. Abell*, 434, 436 (1).
21. *Intoxicating Liquors.—Remonstrance.*—The act of 1905 (Acts 1905, p. 7, §7283i Burns 1905), giving the voters of any township or city ward the right to prevent by remonstrance the issuance of a license to retail intoxicating liquors in such township or ward, is constitutional. *Cain v. Allen*, 168 Ind. —, followed. *Jones v. Alexander*, 395, 398 (3). *Lanham v. Woods*, 398, 400 (1).
22. *Officers.—Vacancies.—Municipal Corporations.*—Article 15, §3, of the Constitution, providing that "whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer * * * shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified," applies to municipal officers. *State, ex rel., v. Ives*, 13, 19 (8).
23. *Officers.—Holding Over.*—An officer who holds over because no successor has been elected and qualified, holds by virtue of article 15, §3, of the Constitution, and not by legislative authority. *State, ex rel., v. Ives*, 13, 21 (9).
24. *Constitution of United States.—Whether Applicable to State Laws.*—Article 3, §2, and the fifth and sixth amendments of the United States Constitution do not apply to laws enacted by the states, but only to prosecutions in the United States courts. *Spurgeon v. Rhodes*, 1, 10 (8).
25. *Physicians.—License.—Police Power.*—Prescribing the qualifications of physicians and surgeons and regulating the practice of such professions, are valid subjects of legislation under the police power. *Spurgeon v. Rhodes*, 1, 11 (9).

CONSTITUTIONAL LAW—Continued.

26. *Physicians.—License.—Revocation.*—Statutes providing for the revocation of the license of a physician, for felony or gross immorality, do not violate the United States or state Constitutions. *Spurgeon v. Rhodes*, 1, 12 (10).
27. *Police Power.—Statutes.—Power of Legislature to Repeal.*—The legislature may repeal or amend any statute relating to the public health or general welfare. *Taylor v. Strayer*, 23, 28 (2).
28. *Substantive Rights.—Procedure.*—Substantive rights protected by the Constitution are of primary importance to the courts, the procedure or method of attaining them being secondary and subordinate. *McSwane v. Foreman*, 171, 177 (8).

CONSTRUCTION—

See STATUTES.

CONTEMPT—

Right of appeal in cases of, see APPEAL AND ERROR, 3; *McSwane v. Foreman*, 171, 175 (3).

Defendant's answer, in indirect, imports absolute verity, see PLEADING, 7; *McSwane v. Foreman*, 171, 177 (7).

For refusal to be examined as a party, see DISCOVERY, 1, 2; *McSwane v. Foreman*, 171, 174 (1), 175 (2).

An exception to the striking out of plaintiff's complaint for refusal to be examined as a witness before the trial, properly presents such ruling on appeal, see APPEAL AND ERROR, 48; *McSwane v. Foreman*, 171, 176 (5).

Indirect.—Examination of Parties.—Refusal.—New Trial.—In a case of indirect contempt for a party's refusal to be examined, as prescribed by §521 Burns 1901, §513 R. S. 1881, a motion for a new trial is not necessary to present the case on appeal, since the sole question to be decided is whether the party has fully answered the charge made. *McSwane v. Foreman*, 171, 175 (4).

CONTRACTS—

See INSURANCE; SALES; VENDOR AND PURCHASER.

Liability of agent on, see PRINCIPAL AND AGENT, 1; *Hayes v. Shirk*, 569, 578 (11).

May be liable in tort for breach of, see TORTS, 1-6; *Flint & Walling Mfg. Co. v. Beckett*, 491.

Answer of worthless goods, see PLEADING, 63; *Price v. Huddleston*, 536, 540 (5).

Whether complaint is on, or in tort, see PLEADING, 23-28; *Flint & Walling Mfg. Co. v. Beckett*, 491.

To sell real estate, complaint on, see PLEADING, 5; *Howard v. Adkins*, 184, 190 (6).

By Attorney-General, on behalf of State, see OFFICERS, 1-6; *Hord v. State*, 622.

Negligence in the performance of, renders performer liable *ex delicto*, see NEGLIGENCE, 1-6; *Flint & Walling Mfg. Co. v. Beckett*, 491.

For services of special engineer, see MUNICIPAL CORPORATIONS, 17-20; *City of Decatur v. McKean*, 249.

CONTRACTS—Continued.

Mechanics' and laborers' liens rest upon, see **LIENS**, 3; *Littler v. Friend*, 36, 41 (3).

Parties to, in insurance, are not on an equality, see **INSURANCE**, 5; *Glens Falls Ins. Co. v. Michael*, 659, 677 (5).

With representatives of decedents' estates, see **EXECUTORS AND ADMINISTRATORS**, 1-4; *Hayes v. Shirk*, 569.

As to evidence in action on, see **EVIDENCE**, 13-18.

Construed with contemporaneous deed, mortgage and notes, see **DEEDS**, 3; *Ellison v. Ganiard*, 471, 489 (8).

When damages stipulated are liquidated, see **DAMAGES**, 3; *Howard v. Adkins*, 184, 191 (12).

Federal Constitution does not apply to, until created, see **CONSTITUTIONAL LAW**, 10; *Hord v. State*, 622, 642 (9).

Against liability for negligence for gratuitous carriage, valid, see **CARRIERS**, 3; *Indianapolis Traction, etc., Co. v. Klentschy*, 598, 601 (5).

Of executors on behalf of estates, see **ACTION**, 1; *Hayes v. Shirk*, 569, 572 (1).

May be construed with contemporaneous deed to establish express trust, see **TRUSTS**, 3; *Ellison v. Ganiard*, 471, 487 (5).

Contractual provisions do not destroy will, see **WILLS**, 14; *Heaston v. Krieg*, 101, 111 (13).

For care and support, in a will, see **WILLS**, 9, 18; *Heaston v. Krieg*, 101.

1. *Consideration.—Uncertainty.—Sales of Real Estate.—“More or Less.”*—A contract to sell 120 acres “more or less” at \$50 per acre does not render the price of such land uncertain, since the number of acres is ascertainable.

Howard v. Adkins, 184, 191 (11).

2. *For Benefit of Third Parties.—Consideration.—Estoppel.*—The defendant will not be permitted to assert a want of consideration in an action on a contract executed by him for the benefit of a third party and performed by the plaintiff.

Hayes v. Shirk, 569, 580 (18).

3. *Consideration.—What is.*—A legal consideration for a contract may consist in some right, interest, profit, or benefit accruing to the promisor, or some forbearance, detriment, loss, responsibility, act, labor, or service given, suffered or undertaken by the promisee.

Hayes v. Shirk, 569, 580 (19).

4. *Executors and Administrators.—Decedents' Estates.—Street Assessments.*—An executor is personally liable for the payment of a street assessment made against lots owned by his testator, where such executor, on behalf of such estate, executed the contract of waiver provided by §4294 Burns 1894, Acts 1891, p. 323, §2, thus securing the right to pay such assessment in annual instalments.

Hayes v. Shirk, 569, 581 (20).

5. *Execution of.—Order for Engine.*—An order for an engine, signed by the agent of the manufacturers thereof, but not by plaintiff, though it specifies that when it is accepted at the home office it becomes a binding contract, is not a contract on the part of plaintiff, though such order was accepted and ratified by defendant.

Huber Mfg. Co. v. Wagner, 98, 100 (2).

6. *Execution.—Fraud.—Relying upon Adverse Party's Representations of Contents of Writing.*—Defendant, who was able

CONTRACTS—Continued.

to read, cannot avoid his contract on the ground of fraud in plaintiff's misrepresenting to him the contents of such contract, where he had ample opportunity but failed to read the same.

Price v. Huddleston, 536, 542 (9).

7. *Written.—Consideration.—Frauds, Statute of.—Statutes.—Evidence.—Parol.*—Under §6630 Burns 1901, §4905 R. S. 1881, the consideration for a written contract need not be stated in the writing, but may be proved by parol.

Howard v. Adkins, 184, 190 (7).

8. *Frauds, Statute of.—Municipal Corporations.—Engineers.*—A contract providing that the plaintiff should serve defendant city as a special civil engineer for one year at a certain compensation, is not within the statute of frauds as provided by §6229 Burns 1901, cl. 5, §4904 R. S. 1881, such provision having no application to contracts which may or may not be performed within one year.

City of Decatur v. McKean, 249, 254 (3).

9. *Separate Instruments.—Deeds.—Mortgages.—Bills and Notes.*—A contract in writing, a deed, mortgage and notes, all executed as a part of one transaction will all be construed as constituting the contract.

Ditchey v. Lee, 267, 275 (9).

10. *Assumption of Payment of Mortgage and Annuity.*—Where the devisee of lands charged with an annuity of \$100 payable to devisee's mother, sold same, reserving a mortgage for \$2,500, payable at her mother's death, and bearing four per cent interest, such interest constituting the annuity payment, a subsequent purchaser agreeing to pay such mortgage and annuity did not thereby assume a double payment of such annuity, but simply to pay as provided in the original agreement.

Ditchey v. Lee, 267, 275 (11).

11. *Municipal Corporations.—Statutory Procedure.—Ordinances.—Resolutions.—Written.*—In the absence of a special statutory method of doing their work, municipal corporations may contract for the performance thereof the same as individuals; and such contracts may be by ordinance or resolution, oral or in writing.

City of Decatur v. McKean, 249, 255 (4).

12. *Parties.—State.—Principal and Agent.—Statutes.*—The burden is upon the plaintiff, in an action against the State, to show a statute expressly or impliedly authorizing his employment, through its contracting officer, before he can establish a liability.

Hord v. State, 622, 631 (1).

13. *Frauds, Statute of.—Real Estate.—Description.—Evidence.—Parol.*—Where the description of real estate, in a contract for the sale thereof, is consistent but incomplete, and its completion neither requires the contradiction or alteration of the description given, nor that a new description be introduced, parol evidence may be received to complete the description and identify the property.

Howard v. Adkins, 184, 187 (2).

14. *Sales.—Real Estate.—Description.—Frauds, Statute of.*—The description: "120 acres of land, more or less, owned by Daniel V. Howard of Dana, Indiana, and located about three miles west of Winamac, Pulaski county, Indiana, in sections seventeen and eighteen, township thirty north of range two west," in a contract for the sale of real estate, is *prima facie* sufficient.

Howard v. Adkins, 184, 189 (5).

15. *Definiteness.—Exchange of Property.*—A contract by which plaintiff agreed to exchange his land at \$50 per acre for defend-

CONTRACTS—Continued.

ant's store at an agreed valuation, the defendant paying for such land in "merchandise and fixtures," sufficiently shows that plaintiff was to pay in cash the excess of the valuation of the store over the price of the land.

Howard v. Adkins, 184, 191 (10).

16. *Implications of Law.—Whether Part of.*—What the law implies in a contract is as much a part thereof as if written therein.

Howard v. Adkins, 184, 190 (9).

17. *Right of.—Legislative Power.*—The right to contract may be restricted by the legislature, or in some cases, may be prohibited.

American Express Co. v. Southern Ind. Express Co., 292, 314 (10).

CONTRIBUTORY NEGLIGENCE—

See INTERURBAN RAILROADS; NEGLIGENCE; STREET RAILROADS, 7, 8; TRIAL.

CORPORATIONS—

When liable for malicious prosecution, see MALICIOUS PROSECUTION, 1-4; *Farmers, etc., Ins. Assn. v. Stewart*, 544.

COSTS—

1. *Right of.—Drains.—Statutes.—Withdrawing Right of Action.*—Where the statute granting a right to establish a certain kind of public drain is repealed without any saving clause as to the costs thereof, such costs fall, as at the common law, upon the parties making same.

Taylor v. Strayer, 23, 31 (12).

2. *Action.—Parties.—Statutes.—Wills.—Widow's Election.—Rescission.*—Under §603 Burns 1901, §594 R. S. 1881, the trial court has the right to tax the costs of a suit to rescind a widow's election to renounce the provisions of her husband's will, against the particular defendants who fraudulently secured her to make such election.

Whitesell v. Strickler, 602, 621 (27).

3. *Separate Issues.*—If defendants make separate issues in a suit, the trial court has the right to apportion the costs according to the costs made on such issues.

Whitesell v. Strickler, 602, 621 (28).

COUNCILMEN—

See MUNICIPAL CORPORATIONS; OFFICERS.

COUNTIES—

Boards of commissioners, in constructing free gravel roads, are engaged in work of, see HIGHWAYS, 3; *State v. Dorsey*, 199, 204 (4).

COURTS—

See BOARDS OF COMMISSIONERS; JURISDICTION.

Legislature may enlarge jurisdiction of equity, see EQUITY; *American Express Co. v. Southern Ind. Express Co.*, 292, 310 (3).

Have inherent power to compel prosecution to furnish defendant a bill of particulars, see CRIMINAL LAW, 3; *Sherrick v. State*, 345, 350 (2).

COURTS—Continued.

Judges of, cannot decide their own cases, see **CONSTITUTIONAL LAW**, 11; *Carr v. Duhme*, 76, 79 (4).

Transfer of cases from Appellate to Supreme, and *vice versa*, see **APPEAL AND ERROR**, 77-81.

1. *Judges.—Interest in Pending Case.—Common Law.*—At the common law the disqualification of a judge because of interest in the litigation did not affect his jurisdiction; but a refusal, upon motion, to vacate the bench was reversible error.
Carr v. Duhme, 76, 80 (5).
2. *Judges.—Interest in Pending Case.—Judgment.—Validity.*—Where, by statute, a judge interested in a pending case is disqualified from sitting, his judgment is void.
Carr v. Duhme, 76, 81 (6).
3. *Boards of Commissioners.—Interested Member.—Judgment.*—A judgment rendered by a board of commissioners, one of whom is an interested party, is voidable and not void, there being no statutory disqualification in such case.
Carr v. Duhme, 76, 82 (7).
4. *Boards of Commissioners.—Interested Members.—Waiver.—Estoppel.*—Parties to a cause before the board of commissioners, a member of which is an interested party, may, by permitting such cause to proceed to judgment without objection, waive such disqualification, there being no statutory disqualification in such case.
Carr v. Duhme, 76, 82 (8).
5. *Judges.—Special.—Change of Venue.*—Under §1838 Burns 1901, §1769 R. S. 1881, the defendant in a criminal case has a right to a change of judge upon the filing of an affidavit alleging the bias and prejudice of such judge against him.
Juliana v. State, 421, 424 (2).
6. *Judges.—Special.—Appointment.*—The regular judge, upon a change of judge, may appoint some other judge, or some attorney in good standing, at his discretion, to try the cause.
Juliana v. State, 421, 424 (3).
7. *Judges.—Special.—Competency.—Public Policy.*—Public policy requires that special judges appointed to try causes shall be competent and disinterested.
Juliana v. State, 421, 424 (4).
8. *Judges.—Special.—Competency.*—An attorney, consulted by defendant's wife with a view to his employment and who examined the indictment and consulted with the defendant, but who was not retained, is not competent to sit as a special judge in defendant's case.
Juliana v. State, 421, 425 (6).
9. *Judges.—Freedom from Prejudice.*—Judges should avoid even the appearance of bias or prejudice in the trial of causes.
Juliana v. State, 421, 427 (7).
10. *Judges.—Interest.—Relationship.*—Judges who have even a remote interest in the cause on trial, or who are even remotely related to a party, should, of their own accord, vacate the bench and appoint a special judge.
Juliana v. State, 421, 427 (8).
11. *City.—Jurisdiction.—Equity Cases.*—City courts have no equity jurisdiction, and cannot set aside judgments obtained by fraud.
Steinmetz v. G. H. Hammond Co., 153, 157 (5).

COURTS—Continued.**12. City.—Justices of the Peace.—Jurisdiction.—Equity Cases.—**

City courts have no equity jurisdiction under §3669 Burns 1901, Acts 1891 p. 24, §2, providing that their jurisdiction, with certain additions, shall be concurrent with mayors' and justices' courts, since neither justices' courts (§1500 Burns 1901, §1433 R. S. 1881), nor mayors' courts (§3497 Burns 1901, §3062 R. S. 1881), are granted such power.

Steinmetz v. G. H. Hammond Co., 153, 157 (6).

CRIMINAL LAW—

See **EMBEZZLEMENT; INDICTMENT AND INFORMATION; LARCENY; PERJURY.**

An act, without the letter, but within the spirit of a criminal statute, not a crime, see **STATUTES**, 8; *Sherrick v. State*, 345, 354 (7).

Original bills of exceptions in cases of, not a part of transcript on appeal under act of 1903 (Acts 1903, p. 338), where preceipe called only for a "transcript," see **APPEAL AND ERROR**, 21, 22; *State v. Thompson*, 96, 97 (1), (2).

Instructions as to self-defense, see **TRIAL**, 19, 20; *Weston v. State*, 324, 327 (3), 329 (7).

1. **Crimes.—Statutory.**—All crimes in Indiana are statutory; and the defendant must be prosecuted and convicted under some certain statute. *Vinnedge v. State*, 415, 420 (8).

2. **Indictment.—Bill of Particulars.**—Defendant, Auditor of State, indicted for embezzlement of money received and appropriated to his own use, is not entitled to a bill of particulars thereof showing from whom and on what account the different items were received. *Sherrick v. State*, 345, 348 (1).

3. **Bill of Particulars.—Right to.—Appeal and Error.**—Courts have the inherent right to compel the state in a criminal prosecution to furnish the defendant with a bill of particulars, where it is apparent from the peculiar nature of the facts that justice and fair dealing require it, the trial court's discretion therein being subject to review on appeal only for abuse. *Sherrick v. State*, 345, 350 (2).

4. **Indictment.—Bill of Particulars.—Motion to Quash.**—An indictment in this State so uncertain as to require the trial judge to grant an order to furnish defendant a bill of particulars is subject to a motion to quash. *Sherrick v. State*, 345, 350 (3).

5. **Public Officers.—Embezzlement.—Bill of Particulars.**—A public officer charged with the embezzlement of public funds is not entitled to a bill of particulars showing the items of such embezzled funds, since he knows thereof better than the State. *Sherrick v. State*, 345, 351 (4).

6. **Larceny.—Felonious Intent.—Contributions.—Religious Associations.**—The soliciting and receipt of money, by defendant, at a church, with the intent to appropriate such money to his own use, falsely representing to the contributors that such money was to be used for a certain benevolent purpose, constitute the felonious elements of larceny. *Towns v. State*, 315, 317 (1).

CRIMINAL LAW—Continued.

7. *Larceny.—Voluntary Contributions.*—The fact that contributors voluntarily gave their money to defendant, with no expectation of its return, at a church contribution, upon the false representation that such money was received for, and was to be used in, the erection of a certain building for benevolent purposes, is no defense to a charge of larceny, where defendant so falsely received such money with the felonious intent to appropriate it to his own use. *Towns v. State*, 315, 318 (2).
8. *Larceny.—Fraud.—Trick.—Possession. — Trespass. — Title.*—The receipt of money by means of a trick or device, where defendant had a preconceived design to steal same, is larceny, since the possession so obtained is not legal and the owner retains the constructive possession of such money, a conversion thereof constituting a trespass, and therefore larceny. *Towns v. State*, 315, 318 (3).
9. *Larceny.—Evidence.—Sufficiency.*—Where defendant secured permission from the pastor of a church upon the false representation that he represented a certain benevolent enterprise and falsely took a collection for such purpose, appropriating the money so collected to his own use, he is properly convicted of larceny. *Towns v. State*, 315, 318 (4).
10. *Self-Defense.—Test.*—Defendant has the right to defend himself by force where, from his viewpoint, it is reasonably apparent that he will probably suffer personal injury at the hands of an aggressor. *Weston v. State*, 324, 328 (4).
11. *Self-Defense.—Character of.*—To justify self-defense by the use of the fists does not require that the reasonably apparent danger shall be so great as the danger sufficient to justify the use of a deadly weapon. *Weston v. State*, 324, 328 (5).
12. *Self-Defense.—When Right Begins.—Assault and Battery.*—Defendant, when it is reasonably apparent to him that he is assaulted, or will be immediately, but not to the degree of endangering his life, may resist by the use of such force as is reasonably calculated to protect him from such dangers. *Weston v. State*, 324, 328 (6).

DAMAGES—

See REPLEVIN.

To lands, see EVIDENCE, 23; *Schmoe v. Cotton*, 364, 369 (10).

Recovery for mental anguish, see TRIAL, 25; *Indianapolis St. R. Co. v. Ray*, 236, 247 (20).

Aggravation of disease, not special, and may be recovered for under general demand, see PLEADING, 77; *Indiana, etc., Traction Co. v. Jacobs*, 85, 91 (4).

Need not be alleged, where contract sued upon stipulates amount, see PLEADING, 6; *Howard v. Adkins*, 184, 191 (13).

Limitation of action for, because of destruction of lateral support, see LIMITATION OF ACTIONS; *Schmoe v. Cotton*, 364, 371 (14).

Judgment for, in replevin, is *res judicata* as to damages up to time of trial, see JUDGMENT, 21; *Jackson v. Morgan*, 528, 534 (9).

1. *Items of.—Seperate Actions.—Personal Injuries.*—The items of damage recoverable in personal injury cases are only such as would support a separate action therefor.

Indianapolis St. R. Co v. Ray, 236, 245 (16).

DAMAGES—Continued.

2. *Doctor's Bills.—Street Railroads.—Husband and Wife.*—The wife may recover doctors' bills, contracted to be paid for by herself, as part of the damage caused by negligent injuries inflicted upon her by a street railroad company.
Indianapolis Traction, etc., Co. v. Kidd, 402, 414 (18).
3. *Liquidated.—Contracts.*—A contract providing that defendant shall exchange his store at a certain valuation for plaintiff's farm at a certain valuation per acre, plaintiff to pay the difference, and providing that in case of breach \$500 should be paid as liquidated damages by the violating party, such sum must be so treated, the actual damage being difficult of computation, and such sum being within the reasonable limits of the probable loss.
Howard v. Adkins, 184, 191 (12).
4. *Lateral Support.—Negligence.—Contributory.*—Negligence and contributory negligence are not factors in an action for damages for depriving plaintiff's land of lateral support.
Schmoe v. Cotton, 364, 367 (3).
5. *Measure of.—Lateral Support.*—The measure of damages for the withdrawal of the lateral support to the plaintiff's land is the difference in the value of plaintiff's land by reason of such injury.
Schmoe v. Cotton, 364, 369 (9).
6. *Negligence.—Proximate Results.—Liability.*—Defendant is legally liable only for the proximate results of his negligence.
Indianapolis St. R. Co. v. Ray, 236, 245 (17).
7. *Negligence.—Physical Injury.—Mental Anguish.*—Damages are recoverable for mental anguish in negligence cases only when there has been a physical impact and where such anguish flows from such impact or where it has its origin or exciting cause coincident with such impact.
Indianapolis St. R. Co. v. Ray, 236, 245 (18).
8. *Speculative.—Negligence.—Remote Results.—Mental Anguish.*—Damages are not recoverable for mental anguish flowing remotely from a physical impact caused by negligence; nor from a reflection or brooding over the plaintiff's physical condition caused by such negligence, such damages being wholly speculative and conjectural.
Indianapolis St. R. Co. v. Ray, 236, 246 (19).
9. *Instructions.—Negligence.—Damages.—Physical Injuries.—Deprivation of Freedom and Social Intercourse.*—An instruction, in an action for personal injuries, that plaintiff is entitled to recover "for being deprived of freedom of action, and social meeting and intercourse with her friends" is reversible error, since, if such damages are recoverable, they are covered by the general instruction on physical injuries and mental anguish, and, unless specially alleged and proved, they will be presumed to flow from reflection or brooding over the injuries received.
Indianapolis St. R. Co. v. Ray, 236, 248 (21).

DECEDENTS' ESTATES—

See DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; WILLS.

Plaintiff must prove execution of note executed by decedent, if general denial is pleaded, see PLEADING, 3; *Digan v. Mandel*, 586, 594 (11).

Not liable on contract of waiver for street assessments executed by executor, see CONTRACTS, 4; *Hayes v. Shirk*, 569, 581 (20).

DECEDENTS' ESTATES—Continued.

Where party dies after service, an appeal from the judgment rendered is governed by the civil code and not by act concerning settlement of decedents' estates, see **APPEAL AND ERROR**, 13; *Hayes v. Shirk*, 569, 573 (3).

Contracts of executors concerning payment of street assessments, see **ACTION**, 1; *Hayes v. Shirk*, 569, 572 (1).

Mere settlement of, by administrator, does not estop heirs from contesting will, see **WILLS**, 2-5; *Foley v. O'Donaghue*, 134.

Executors and Administrators.—Duty to Settle Estates.—It is the duty of an executor to administer the testator's estate, without regard to the heirs' statutory right of contest, and distribute the proceeds as directed in the will.

Foley v. O'Donaghue, 134, 138 (5).

DECLARATIONS—

See **EVIDENCE**.

DEEDS—

See **CONTRACTS**; **FRAUDULENT CONVEYANCES**; **TRUSTS**; **VENDOR AND PURCHASER**; **WILLS**.

Devise of all land of which testator may "die seized" cannot operate as a deed, see **WILLS**, 17; *Heaton v. Krieg*, 101, 113 (17).

May, with other writings, constitute an express trust, see **TRUSTS**, 1; *Ellison v. Ganiard*, 471, 485 (3).

Parties to suits for reformation of, see **ACTION**, 2; *Adams v. Betz*, 161, 168 (4).

1. *Description.—Acres Conveyed.—"More or Less."*—The words "more or less" following the number of acres conveyed by a deed, usually characterize such number as matter of description and not of the essence of the contract.

Adams v. Betz, 161, 169 (6).

2. *Boundaries.—Disputed Title.*—Where a grantor conveyed certain lands, bounded by a fence, located, though erroneously, on the supposed line, said conveyance containing in fact fewer acres than was supposed, a subsequent deed by the grantor and others interested of the disputed tract beyond the fence puts at rest the title to said disputed tract as against any claims of the grantee of the lands bounded by such fence.

Adams v. Betz, 161, 170 (8).

3. *Contemporaneous Contracts.—Construction.—Trusts.—Bankruptcy.—Quieting Title.*—A deed absolute upon its face, when construed with a contemporaneous writing executed with such deed, which creates the grantee a trustee of the granted property and directs a sale thereof and a distribution of the proceeds to certain determinable beneficiaries, passes no beneficial title to such grantee; and his trustee in bankruptcy cannot maintain a suit thereon to quiet title.

Ellison v. Ganiard, 471, 489 (8).

4. *Lease and Release.—Statute of Uses.—Constructions.*—A deed of lease and release attempting to convey a freehold in-futuro will be upheld as a covenant to stand seized, thus making it

DEEDS—Continued.

effectual under the statute of uses, though such deed was void at the common law. *Heaston v. Krieg*, 101, 115 (22).

5. *Wills.—Construction.*—Where an instrument intended as a will cannot operate as such, it will be upheld as a deed if possible; and *vice versa*. *Heaston v. Krieg*, 101, 115 (23).

DEMURRER—

See PLEADING.

DESCENT AND DISTRIBUTION—

See WILLS.

1. *Decedents' Estates.—Widows.—Liberal Policy Towards.*—The policy of the law of this State is to deal liberally with the widow in the distribution of the husband's estate. *Whitesell v. Strickler*, 602, 610 (8).
2. *Decedents' Estates.—Real Property.—Wills.*—Real property, on the death of its owner, descends to the heirs, and the personal representatives have no control over it, unless so provided in such owner's will. *Hayes v. Shirk*, 569, 580 (16).

DISCOVERY—

Cannot, over objection, enter house to have, see TRESPASS, 1; *McSwane v. Foreman*, 171, 176 (6).

Parties are entitled to, see INJUNCTION, 5; *Spurgeon v. Rhodes*, 1, 8 (4).

As to striking out plaintiff's complaint for failure to be examined as a witness before the trial, see APPEAL AND ERROR, 48; *McSwane v. Foreman*, 171, 176 (5).

1. *Examination of Parties.—Refusal.—Contempt.—Appeal and Error.*—A proceeding for contempt for refusal to comply with §521 Burns 1901, §513 R. S. 1881, providing that if a party refuse to attend and be examined prior to a trial, he "may be punished as for a contempt," is governed, as to procedure, by §1025 Burns 1901, §1013 R. S. 1881, providing for punishment of persons guilty of indirect contempt and giving a right of appeal. *McSwane v. Foreman*, 171, 174 (1).
2. *Parties.—Examination.—Refusal.—Contempt.—Indirect.—Appeal and Error.*—The punishment of a party, by striking out his complaint for refusing to be examined as provided by §521 Burns 1901, §513 R. S. 1881, is governed, as to an appeal, by that provision of §1023 Burns 1901, §1011 R. S. 1881, which gives the defendant the right to "except to the opinion and judgment of the court." *McSwane v. Foreman*, 171, 175 (2).

DRAINS—

See MUNICIPAL CORPORATIONS.

Taking of land for, is for a public use, see EMINENT DOMAIN, 1; *City of Huntington v. Amis*, 375, 378 (1).

Evidence of capacity of, to carry off water of district, see EVIDENCE, 22; *Beery v. Driver*, 127, 133 (8).

Repealing clause of act of 1905, relating to drains, see STATUTES, 19-21; *Taylor v. Strayer*, 23.

DRAINS—Continued.

Effect of death of parties to a proceeding to establish, see **APPEAL AND ERROR**, 82-84; *Laporte Land Co. v. Morrison*, 73.

Instruction assuming that proposed drain will reclaim wet lands, erroneous, see **TRIAL**, 27; *Beery v. Driver*, 127, 133 (6).

Instructions as to costs and public utility, see **TRIAL**, 26; *Beery v. Driver*, 127, 132 (5).

1. *Right to Construct.—Legislative Discretion.*—There is no common-law right to construct a drain over another's land, and a sanction so to do, given by the legislature, may be withdrawn at the discretion of the legislature.

Taylor v. Strayer, 23, 27 (1).

2. *Lakes.—Statutes.—Repeal.—Saving Clause.*—The repealing clause of the act of 1905 (Acts 1905, pp. 456, 480, §14), providing: "Such repeal shall not affect any pending proceedings in which a ditch has been ordered established," does not save an action pending on appeal in the circuit court, though the board of commissioners had rendered a judgment establishing such drain.

Taylor v. Strayer, 23, 28 (4).

3. *Statutes.—Repeal.—Saving Clause.*—The repealing clause of the act of 1905 (Acts 1905, pp. 456, 480, §14), providing: "Such repeal shall not affect any pending proceedings * * * in which there is no attempt to and which will not lower or affect any lake" covering ten acres, saves all pending ditch proceedings, except those draining such lakes, and they may be prosecuted to final judgment regardless of such act.

Taylor v. Strayer, 23, 30 (9).

4. *Cleaning.—Allotments.—Statutes.*—Under §§5633, 5637 Burns 1901, Acts 1889, p. 53, §2, and Acts 1893, p. 271, it is the duty of landowners, after an allotment of their portions of a drain, to clean out and keep in repair their respective allotments.

Quick v. Parratt, 31, 34 (1).

5. *Repairs.—Trustee's Duties.*—Under §5638 Burns 1901, Acts 1891, p. 47, §2, in case the landowner fails to clean or keep in repair his allotment of a drain, the proper township trustee, after notice and failure of such landowner to comply, shall have such work done at such landowner's expense, such expense to be placed on the tax duplicates or collected by suit by such trustee.

Quick v. Parratt, 31, 34 (2).

6. *Repairs.—Cost of.—Collection.—Townships.—Trustees.*—Under §5638 Burns 1901, Acts 1891, p. 47, §2, the proper landowner alone is liable for the cost of cleaning or keeping in repair his allotment of a public drain; and an action cannot be maintained against the township therefor, though the trustee thereof ordered the work done and gave an official certificate therefor.

Quick v. Parratt, 31, 35 (3).

7. *Remonstrances.—Joint.—When Proper.*—All remonstrators to a ditch proceeding may properly join in a remonstrance against same on the grounds that the benefits thereof would not equal the expense, and that it would not be of public utility. *Yeoman v. Shaeffer*, 155 Ind. 308, distinguished.

Beery v. Driver, 127, 129 (2).

8. *Cleaning.—Duty of Landowners.*—Under §§5637, 5638 Burns 1901, Acts 1893, p. 271, and Acts 1891, p. 47, §2, it is the im-

DRAINS—Continued.

perative duty of the landowners through whose lands a public ditch is constructed, annually to clean out the same without waiting for the orders of the township trustee.

Beery v. Driver, 127, 129 (3).

9. *Obstructions.—New Drains Because of.*—Landowners, through whose negligence and failure of duty a public ditch has become obstructed and rendered unfit for drainage, cannot, because of such obstructions, establish a new drain and thereby shift the burden of clearing such obstructions upon other people.

Beery v. Driver, 127, 132 (4).

10. *Petition.—Notices.—Jurisdiction.*—The filing of a petition and the giving of notice as prescribed by §§5655, 5656 Burns 1901, §4285 R. S. 1881, and Acts 1893, p. 329, invests the board of commissioners with jurisdiction in a drainage proceeding.

Carr v. Duhme, 76, 79 (3).

11. *Statutes.—Repeal.—Saving Clause.*—The drainage law of 1891 (Acts 1891, p. 304, §§3598-3606 Burns 1901) was repealed by the act of 1905 (Acts 1905, p. 456, §§5622-5635 Burns 1905), but pending proceedings were not affected thereby because of the saving clause therein (Acts 1905, p. 456, §14, §5635 Burns 1905). *Clemans v. Hatch*, 168 Ind. —, followed.

City of Huntington v. Amiss, 375, 379 (4).

DUE PROCESS OF LAW—

See CONSTITUTIONAL LAW.

EASEMENTS—

1. *Streets and Alleys.—Property Rights.*—The right of egress and ingress is a property right belonging to the owner of a lot, and can be taken from him only by due process of law.

MacGinnitie v. Silvers, 321, 324 (3).

2. *Private Ways.—Negligence.—Care Required from Owner.*—The owner of a private way, built in such manner as to constitute a quasi-dedication, or an invitation, to certain persons to use same, is liable for any injury to such persons caused by his failure to use ordinary care therein.

Baltimore, etc., R. Co. v. Slaughter, 330, 337 (4), 338 (4).

ELECTION—

See INSURANCE.

By widow, see WILLS, 23-31; *Whitesell v. Strickler*, 602.

When *res judicata*, see JUDGMENT, 27, 28; *Whitesell v. Strickler*, 602, 616 (18), 617 (19).

Between action in tort or on contract, see TORTS, 3, 5; *Flint & Walling Mfg Co. v. Beckett*, 491, 498 (3), 499 (5).

Complaint to set aside widow's election refusing to take under husband's will, see PLEADING, 89; *Whitesell v. Strickler*, 602, 612 (13).

When widow is not estopped to set aside election, refusing to take under the will, see ESTOPPEL, 3; *Whitesell v. Strickler*, 602, 617 (20).

ELECTIONS—

As to bribery of voters, see EVIDENCE, 7-12; *Tinkle v. Wallace*, 382.

Bribery by candidate disqualifies from holding office, see CONSTITUTIONAL LAW, 12; *Tinkle v. Wallace*, 382, 389 (7).

Ordinary, not to fill "vacancies," see STATUTES, 22; *State, ex rel., v. Ives*, 13, 21 (10).

Of councilmen, statutes relating thereto, see STATUTES, 14-17; *State, ex rel., v. Ives*, 13.

Complaint to mandate commissioners to place names on official ballots, see PLEADING, 42; *State, ex rel., v. Board, etc.*, 276, 287 (8).

Finding that contestee in election contest bribed voters, sustains judgment declaring vacancy, see JUDGMENT, 4; *Tinkle v. Wallace*, 382, 393 (16).

1. *Ballots.—Preparation of.—Political Parties.*—While the printing and distribution of the official ballots are entrusted to public officers (§6214 Burns 1901, Acts 1889, p. 157, §17), still the selection and certification of its candidates are left to the respective political parties.

State, ex rel., v. Board, etc., 276, 282 (1).

2. *Nominations.—Ballots.—Election Commissioners.—Statutes.—Mandatory.*—Section 6214 Burns 1901, Acts 1889, p. 157, §17, providing that the election commissioners shall place on the official ballot under the party emblem the nominees selected "at the time and place designated in the call of the regularly constituted party authorities," is in the highest degree mandatory.

State, ex rel., v. Board, etc., 276, 283 (2).

3. *Political Parties.—Rules.—County Chairmen.—County Conventions.*—A county chairman regularly selected, under the call of the controlling state central committee, by the precinct committeemen, regularly chosen under the call of such state central committee, is, together with such precinct committeemen, the proper authority to call a county convention of such party.

State, ex rel., v. Board, etc., 276, 284 (3).

4. *Official Ballots.—County Nominations.—Political Parties.*—County nominatons made by a convention not called by the county central committee selected under the regular call of the Republican state central committee, cannot be placed on the official ballots as the nominees of the Republican party.

State, ex rel., v. Board, etc., 276, 284 (5).

5. *Official Ballots.—Nominations.*—Nominations made by a county mass convention called by persons who claimed to be, but who were not, the Republican county central committee, have no legal right to the party emblem on the official ballots.

State, ex rel., v. Board, etc., 276, 285 (6).

6. *Political Parties.—Divisions.—Courts.—Jurisdiction.*—Courts have jurisdiction to determine which of conflicting lists of candidates claimed to be made by a political party, is entitled to go on the official ballot under the emblem of such party.

State, ex rel., v. Board, etc., 276, 285 (7).

7. *Official Ballots.—Election Commissioners.—Public Duty.*—An action to mandate the board of election commissioners to

ELECTIONS—Continued.

place on the official ballots the names of the nominees of a party is a matter involving the highest public interest.

State, ex rel., v. Board, etc., 276, 289 (13).

8. *Contest.—Township Trustees.—Bribery.—Constitutional Law.*—Under article 2, §6, of the Constitution, providing: "every person shall be disqualified for holding office, * * * who shall have given or offered a bribe, threat or reward to secure his election," and §6312 Burns 1901, §4756 R. S. 1881, providing that any election may be contested on the ground that the contestee is ineligible, the election of a township trustee may be contested because of his bribing or offering to bribe an elector.

Tinkle v. Wallace, 382, 385 (1).

9. *Contest.—Statement of.—Constitutional Law.—Statutes.*—A statement of an election contest showing that the contestee (1) gave, and (2) offered to give bribes and rewards to electors to secure his election is based upon article 2, §6, of the Constitution and not upon §2328 Burns 1901, Acts 1889, p. 267, §2, providing that any candidate offering a bribe shall be fined and disfranchised.

Tinkle v. Wallace, 382, 386 (2).

10. *Contest.—Statement of.—Constitutional Law.*—A statement of an election contest showing that the contestee (1) gave and (2) offered to give bribes to electors to secure his election is grounded upon the constitutional provision (Art. 2, §6), rendering any candidate ineligible who gives or offers to give a bribe to secure his election, although such statement details the giving and offering of such bribes with the particularity required under §2328 Burns 1901, Acts 1889, p. 267, §2, providing that such acts shall constitute a crime.

Tinkle v. Wallace, 382, 386 (4).

11. *Candidates.—Eligibility.—Bribery.—Conviction.*—A candidate convicted of bribery is *ipso facto*, rendered ineligible to accept a public office or to retain one already possessed.

Tinkle v. Wallace, 382, 387 (5).

12. *Contest.—Civil.—Criminal Prosecution.*—A criminal prosecution and conviction is not a condition precedent to the right of an elector to contest the election of a candidate, but the State or an elector has the right to proceed therein independently.

Tinkle v. Wallace, 382, 387 (6).

13. *Questions.—Offers of Proof.—Trial.*—To present any question on appeal concerning the exclusion of evidence, proper questions must be asked the witness and offers of proof, responsive to such questions, made.

Tinkle v. Wallace, 382, 392 (14).

14. *Words and Phrases.—"Vacancy."—What Is.*—An election held in advance of the expiration of an office is not an election to fill a "vacancy."

State, ex rel., v. Ives, 13, 18 (6).

15. *Tie Vote.—Vacancy.—Statutes.*—The contingency that a tie vote might be cast at the first election held thereunder does not control the construction of the act of 1905 (Acts 1905, pp. 219, 242, §45) so as to cause the office of councilman to become "vacant" at such election, when it could not become "vacant" thereafter in case of a tie vote.

State, ex rel., v. Ives, 13, 19 (7).

ELECTRIC LIGHTS—

Negligence in conduct of, by city, complaint for, see **PLEADING**, 56; *Aiken v. City of Columbus*, 139, 150 (13).

Cities are liable for negligence in conduct of, see **MUNICIPAL CORPORATIONS**, 11, 13, 15, 16; *Aiken v. City of Columbus*, 139; *City of Richmond v. Lincoln*, 468.

EMBEZZLEMENT—

See **CRIMINAL LAW**; **LARCENY**.

For indictment, see **INDICTMENT AND INFORMATION**, 9; *Vinnedge v. State*, 415, 419 (5).

Burden is on State to show that statute applies to Auditor of State, see **STATUTES**, 5; *Sherrick v. State*, 345, 356 (8).

1. *Elements.—Trespass.*—Embezzlement, as distinguished from larceny, does not include the element of trespass in obtaining the possession of the money or thing appropriated.

Vinnedge v. State, 415, 418 (3).

2. *Possession.—How Obtained.*—Under §2022 Burns 1901, §1944 R. S. 1881, to constitute embezzlement, the money appropriated must come into defendant's possession by virtue of his employment.

Vinnedge v. State, 415, 418 (4).

3. *Larceny.—Statutes.*—The statute defining embezzlement (§2022 Burns 1901, §1944 R. S. 1881) is supplemental to that defining larceny (§2006 Burns 1901, §1933 R. S. 1881), and the two do not overlap.

Vinnedge v. State, 415, 420 (6).

4. *Proof of Larceny.*—A defendant cannot be convicted of larceny where the proof shows embezzlement.

Vinnedge v. State, 415, 420 (7).

5. *Evidence.—Officers.—Money.—From Whom Received.*—On an indictment of the Auditor of State for embezzlement the State is not required to prove the source from which the embezzled money was received nor the fund to which it belonged, proof of its receipt, the trust and the conversion of at least a part thereof, being sufficient.

Sherrick v. State, 345, 351 (5).

6. *Essentials.—Auditor of State.*—To convict the Auditor of State of embezzlement the State must show that he converted money belonging to the State, and that such money came into his hands according to law.

Sherrick v. State, 345, 359 (13).

7. *Auditor of State.—Receipt of Insurance Taxes.—Official Capacity.—Estoppel.*—The Auditor of State, indicted for the embezzlement of insurance taxes received by him while in the discharge of his duties as such auditor, is not estopped from showing that the duty of receiving such taxes was not enjoined upon him by the law.

Sherrick v. State, 345, 362 (17).

EMINENT DOMAIN—

Private property may be taken only by the exercise of the power of, see **CONSTITUTIONAL LAW**, 1; *State v. Richcreek*, 217, 223 (4).

1. *Drains.—Public Use.*—The condemnation of private property for drainage purposes constitutes a taking for a public use.

City of Huntington v. Amiss, 375, 378 (1).

EMINENT DOMAIN—Continued.

2. *Interurban Railroads.—Procedure.—Statutes.*—Section one of the act of 1903 (Acts 1903, p. 125, §5464a Burns 1905), providing particularly in reference to the crossing of steam railroads by interurban, suburban and street railroads, is supplemental to section five of the act of 1901 (Acts 1901, p. 461, §5468e Burns 1901), providing generally for condemnation proceedings by interurban and other similar railroads; and the two sections are to be construed as if they were parts of one act.

Terre Haute, etc., R. Co. v. Indianapolis, etc., Co., 193, 195 (1).

3. *Awards.—Appeal from.—Exceptions.—Questions Presentable.—Procedure.*—Under §5468e Burns 1901, Acts 1901, p. 461, §5, providing for appeals from an award in condemnation proceedings, matters of law and fact may be set up in the exceptions to an award; and on a hearing in the circuit court the case is governed by the rules of procedure in civil cases where applicable.

Terre Haute, etc., R. Co. v. Indianapolis, etc., Co., 193, 196 (2).

4. *Interurban Railroads.—Awards.—Appeal.—Rights of Parties.*—Neither the filing of an instrument of appropriation nor the payment of an award, where an appeal is taken, gives the condemning company any title to the lands sought to be condemned, but during such appeal such company is a licensee by law, the proceeding remaining *in fieri* until the final disposition on appeal.

Terre Haute, etc., R. Co. v. Indianapolis, etc., Co., 193, 198 (5).

EQUITY—

See FRAUDULENT CONVEYANCES.

Has jurisdiction to set aside fraudulent judgments, see JUDGMENT, 10; *Steinmetz v. G. H. Hammond Co.*, 153, 157 (4).

City courts have no jurisdiction to try cases in, see COURTS, 11, 12; *Steinmetz v. G. H. Hammond Co.*, 153, 157 (5), (6).

Facts not constituting laches in widow's suit to set aside election not to take under will, see WILLS, 31; *Whitesell v. Strickler*, 602, 619 (24).

Enlarging Jurisdiction.—Legislative Powers.—The legislature has the power to enlarge the jurisdiction of the courts of equity. *American Express Co. v. Southern Ind. Express Co.*, 292, 310 (3).

ESTOPPEL—

Party is estopped to question finding of a fact, where upon his motion, his opponent's evidence thereof was improperly excluded, see HIGHWAYS, 12; *Spaulding v. Mott*, 58, 71 (14).

Auditor of State not estopped to show that money received by him does not legally belong to State, see EMBEZZLEMENT, 7; *Sherrick v. State*, 345, 362 (17).

Defendant is estopped to show a want of consideration for a contract for the benefit of a third party, performed by plaintiff, see CONTRACTS, 2; *Hayes v. Shirk*, 569, 580 (18).

ESTOPPEL—Continued.

Cestuis que trust, not estopped by failure of trustee to record instrument creating trust, see **BANKRUPTCY**, 2; *Ellison v. Ganiard*, 471, 489 (9).

Party requiring opponent to make a will an exhibit to the complaint, is estopped to assert on appeal that such will is not an exhibit, see **APPEAL AND ERROR**, 50; *Heaston v. Krieg*, 101, 107 (1).

1. *Origin.—Purpose.*—Estoppel arises from equitable principles and is designed to aid in dispensing justice, and its purpose is to preserve acquired rights and not to create new ones.

Sherrick v. State, 345, 361 (16).

2. *Nature of.—Bankruptcy.—Trustee.*—Where a creditor dealt with a bankrupt, relying upon the bankrupt's ownership of property held by him under a deed absolute upon its face, such property in reality being held in trust, such creditor, to avail himself of an estoppel, must bring a suit to subject such land to the payment of his claim, the trustee in bankruptcy being unable to assert such an estoppel.

Ellison v. Ganiard, 471, 490 (10).

3. *In Pais.—Taking Advantage of One's Own Wrong.*—Where defendant wrongfully and fraudulently secured the plaintiff to renounce the provisions of her husband's will, defendant's purchase of the devised property at administrator's sale and expenditure of money thereon to the knowledge of plaintiff, and plaintiff's conveyance to defendant of her one-third interest in such lands in consideration of care and support, do not estop plaintiff from setting aside her election to renounce the provisions of the will and assert title to the proceeds of the property in the hands of the administrator.

Whitesell v. Strickler, 602, 617 (20).

EVIDENCE—

In fraudulent conveyance suits, see **FRAUDULENT CONVEYANCES**.
Weighing of, on appeal, see **APPEAL AND ERROR**, 111-113.

Exclusion of, how questioned, see **ELECTIONS**, 13; *Tinkle v. Wallace*, 382, 392 (14).

Extrinsic evidence, admissible to show jurisdiction, where record is silent, see **JURISDICTION**, 4; *Todd v. Crail*, 48, 54 (4).

Of voluntary conveyance without consideration establishes *prima facie* case of fraud against debtor, see **EXECUTION**; *Stark v. Lamb*, 642, 646 (5).

Sufficiency of, to convict for larceny, see **CRIMINAL LAW**, 9; *Towns v. State*, 315, 318 (4).

Possession of a note, as evidence of ownership, see **BILLS AND NOTES**, 5; *Digan v. Mandel*, 586, 595 (13).

Different reasons than those urged below cannot be assigned on appeal for excluding, see **APPEAL AND ERROR**, 101; *Spaulding v. Mott*, 58, 72 (15).

Questions on, cannot be determined on appeal in the absence of such evidence, see **APPEAL AND ERROR**, 18; *Trombley v. State*, 231, 232 (1).

EVIDENCE—Continued.

Order of introduction, largely discretionary with trial court, see TRIAL, 7, 8; *Todd v. Crail*, 48, 57 (11); *Tinkle v. Wallace*, 382, 393 (15).

Must support allegations, see TRIAL, 51; *Digan v. Mandel*, 586, 591 (5).

Competency of testator's physicians to testify in will contest, see WITNESSES; *Heaton v. Krieg*, 101, 117 (25).

Parol evidence, inadmissible to overthrow the intent of a will, see WILLS, 20; *Heaton v. Krieg*, 101, 114 (20).

1. *Bills and Notes.—Introduction of.—Preliminary Proof Necessary.*—Proof of the possession of a note by the plaintiff and of the defendant's signature thereto, authorizes the admission of such note in evidence, the order of proof being immaterial.

Digan v. Mandel, 586, 593 (9).

2. *Burden of Proof.—Contributory Negligence.*—The defendant, in a personal injury case, to defeat plaintiff, must establish by fair preponderance of the evidence the contributory negligence of plaintiff. *City of Indianapolis v. Keeley*, 516, 526 (18).

3. *Admissions of Attorney.*—Admissions of an attorney at law are not evidence against the client.

Spurgeon v. Rhodes, 1, 10 (7).

4. *Declarations.—Larceny.*—Evidence of the declarations of defendant, charged with the larceny of certain contributions received by him upon his false representation that such money was to be used in the work of a certain benevolent enterprise, as to the institution with which he was connected in the raising of such money, is admissible.

Towns v. State, 315, 318 (5).

5. *Declarations of Plaintiff's Husband.—Wills.—Contest.—Undue Influence.*—It is not erroneous to exclude evidence of declarations of plaintiff's husband tending to show undue influence in a will contest where the evidence on such question is not sufficient to warrant a submission of such question to the jury.

Heaton v. Krieg, 101, 119 (26).

6. *Declarations of Patient to Physician.*—The declarations of a patient to her physician concerning her injuries are admissible, in her behalf, in an action of damages for such injuries.

Indiana, etc., Traction Co. v. Jacobs, 85, 92 (6).

7. *Circumstantial.—Bribery.—Identification of Briber.*—Evidence that the witness was called from his house in the night and given \$1 and promised certain work by a person giving his name as that of the candidate for township trustee, is admissible in an election contest, although the witness was unable to identify such candidate as the man who committed such act.

Tinkle v. Wallace, 382, 389 (8).

8. *Identification.—Failure of.—Motion to Strike Out.*—Where circumstantial evidence is introduced tending to show the commission of an act by defendant, but the evidence is not sufficient to connect defendant with the commission thereof, a motion to strike out such evidence should be made.

Tinkle v. Wallace, 382, 390 (9).

9. *Sufficiency.—Question for Jury.*—Where a witness testifies that he was bribed by a person representing himself to be the

EVIDENCE—Continued.

defendant, and the defendant denies any knowledge thereof and produces a witness who testifies that he (such witness) gave such bribe without defendant's knowledge, defendant's guilt is a proper question for the court or jury.

Tinkle v. Wallace, 382, 391 (10).

10. *Bribery.—Intentions.*—In an action to contest an election, the intent of the taker of a bribe is not material evidence, the intent of the giver being admissible as characterizing the transaction.

Tinkle v. Wallace, 382, 391 (11).

11. *Bribery.—Advice.—Elections.—Contest.*—Where defendant in a contested election case was challenged "for using money to influence voters" the court's refusal to permit him at the trial to answer the question: "Did you request Mr. Cady or Mr. Curd to seek the advice of anybody else?" (concerning the making of an affidavit enabling him to vote) is harmless error.

Tinkle v. Wallace, 382, 391 (12).

12. *Failure to Vote When Challenged for Bribery.—Explanations.*—Defendant, in the trial of an election contest, may explain his reasons for his failure to vote at the election when challenged "for using money to influence voters."

Tinkle v. Wallace, 382, 392 (13).

13. *Parol.—Contracts.—Boundaries.—Partition.*—In a suit to quiet title to lands enclosed by a fence, evidence of a parol agreement between plaintiff and defendant's grantor that such fence should mark the true boundary line between their lands, is admissible.

Adams v. Betz, 161, 171 (9).

14. *Contracts.—Contemporaneous Oral Declarations.*—The admission of the declarations of parties made during the negotiations resulting in the execution of the contract sued upon is not necessarily harmful to the party refusing to comply.

Ditchey v. Lee, 267, 274 (8).

15. *Parol.—Written Contracts.—Explanations.*—Parol evidence is not admissible to vary or contradict a written contract; but such evidence is admissible to explain the circumstances, to show the real consideration, to identify the subject-matter and to give effect to such contract.

Ditchey v. Lee, 267, 275 (10).

16. *Parol.—Contracts.—Application of, to Subject-Matter.*—Parol evidence is admissible to apply a contract to its subject-matter.

Howard v. Adkins, 184, 188 (3).

17. *Parol.—Contracts.—Construction.—Frauds, Statute of.*—Contracts within the statute of frauds being construed, like other contracts, in the light of their surroundings, parol evidence is admissible to show such surroundings.

Howard v. Adkins, 184, 188 (4).

18. *Parol.—Consideration.—Indefinite.—Contracts.—Written.*—Parol evidence is admissible to clear up an ambiguity in the written statement of the consideration of a written contract.

Howard v. Adkins, 184, 190 (8).

19. *Opinions.*—The opinion of a witness upon facts and conditions which can be fully placed before the jury is not admissible in evidence.

Indianapolis Traction, etc., Co. v. Kidd, 402, 412 (14).

EVIDENCE—Continued.

20. *Opinions.—Insanity.—Lay Witnesses.*—Lay witnesses, after testifying to the facts of their relationship with testatrix, may upon such facts as a basis state their opinion as to her sanity or insanity. *Heaston v. Krieg*, 101, 120 (28).
21. *Expert.—Hypothesis.—Failure to Show Basis of Facts.—Striking Out.*—Where expert evidence is admitted to prove probable resulting injuries, certain conditions being hypothetically assumed, plaintiff's counsel agreeing to show such conditions, no question can be raised on the introduction of such evidence, on plaintiff's failure to prove such hypothetical conditions, unless defendant at the close of plaintiff's case, moves to strike out such evidence. *Indiana, etc., Traction Co. v. Jacobs*, 85, 91 (5).
22. *Opinions.—Drains.*—It is improper to ask a lay witness in a drainage proceeding whether the proposed drain would be more effectual in carrying off the water than the present one if cleaned, since that is a question for the determination of the jury, and is capable of proof otherwise. *Beery v. Driver*, 127, 133 (8).
23. *Damages.—Value of Land Before and After Injury.—Opinions.*—The opinion of a witness as to the value of lands before and after the injuries thereto is competent in an action for damages caused by the withdrawal of lateral support. *Schmoe v. Cotton*, 364, 369 (10).
24. *Part of Viewers' Report.—Highways.—Gravel Roads.*—It is not error for the court to refuse to permit plaintiffs to introduce the favorable parts only of the viewers' report in a gravel road case, in a suit to enjoin further proceedings in the construction of such gravel road. *Todd v. Crail*, 48, 58 (12).
25. *Viewers' Report.—Fraud.—Irregularities.—Highways.—Gravel Roads.*—Evidence of fraud and irregularities in the viewers' report in a gravel road case is inadmissible in a suit to enjoin further construction of such road, where jurisdiction of the board of commissioners is proved. *Todd v. Crail*, 48, 58 (13).
26. *Entries.—Proof of Posting.—Highways.—Gravel Roads.*—In a suit to enjoin the further construction of a gravel road, defendants, to prove the board's jurisdiction, may introduce the entries of the board and the original written proof of posting notices of the presentation of the gravel road petition to such board. *Todd v. Crail*, 48, 58 (14).
27. *Interurban Railroads.—Owner and Operator of.*—Evidence by an employe that he was in the employ of the defendant and in charge of the car on which plaintiff was a passenger when injured, sufficiently shows that defendant was operating such car, especially when defendant was contesting the case upon its merits. *Indiana, etc., Traction Co. v. Jacobs*, 85, 92 (7).
28. *Judicial Notice.—Republican Party.*—Courts take judicial notice that there is but one Republican party in this State. *State, ex rel., v. Board, etc.*, 276, 284 (4).
29. *Judicial Notice.—Street Railroads.—Carriers.*—Courts take judicial notice that street railway companies are carriers of passengers. *Indianapolis St. R. Co. v. Ray*, 236, 240 (4).

EVIDENCE—Continued.

30. *Judicial Notice.—Pleadings.*—Courts judicially know that horses sometimes take fright at unusual objects.
Baltimore, etc., R. Co. v. Slaughter, 330, 341 (10).
31. *Mortgages.—Existence of.—Payment.—Bills and Notes.*—Where defendants, in an action on certain notes, pleaded payment, and contended, as sustaining such plea, that they had been during the time such notes existed fully able to pay same, evidence that a mortgage in a large sum covered their farm, and that a foreclosure suit was brought against them during such time, is competent. *Hasper v. Weitcamp*, 371, 375 (6).
32. *Res Ipsa Loquitur.—Municipal Corporations.—Defective Streets.*—The doctrine of *res ipsa loquitur* does not apply to injuries caused by defective streets.
City of Indianapolis v. Keeley, 516, 525 (11).
33. *Negligence.—Burden of Proof.—Effect of Statutory Change of Rule.*—The effect of the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) was to relieve the plaintiff, in a personal injury case, from proving the exercise of due care.
City of Indianapolis v. Keeley, 516, 526 (17).
34. *Injury to Crops in Barn.—Negligence.—Erection of Windmill.—Damages.*—In an action for damages caused by the falling of a windmill negligently erected by defendant upon plaintiff's barn, evidence of the damage caused to plaintiff's crops stored in the barn is admissible.
Flint & Walling Mfg. Co. v. Beckett, 491, 504 (19).
35. *Presumptions.—Exercise of Due Care.*—There is no presumption in this State that the plaintiff, in a personal injury case, used due care.
City of Indianapolis v. Keeley, 516, 525 (12).
36. *Presumptions.—Nature of.*—Presumptions of law are inferences warranted by the experiences of the courts in administering justice, some of them being conclusive of a given proposition and some being only *prima facie* evidence thereof.
City of Indianapolis v. Keeley, 516, 527 (19).
37. *Presumptions.—Inferences.*—Presumptions of fact are inferences of fact drawn by the experienced mind from the existence of other facts proved in a case, and such inferences or presumptions are questions for the jury.
City of Indianapolis v. Keeley, 516, 527 (20).
38. *Flying of Burning Sparks.—Distance.*—Evidence of the distance which flying sparks were carried from a burning barn is admissible as a part of the *res gestae* in an action against a railroad company for negligently setting fire to such barn, thereby setting on fire a house and storeroom, though the direction of the wind was not shown to have been the same as when the sparks left the engine.
Cleveland, etc., R. Co. v. Hayes, 454, 458 (8).
39. *Weighing of.—Circumstantial.—Railroads.—Setting Fires.*—A railroad company may be held negligent in setting fires, though its inspector, experts and servants all testify that its spark-arrester was of the most approved pattern, properly inspected and in good condition, where other evidence shows that the locomotive emitted sparks the size of a dime, throwing

EVIDENCE—Continued.

- them a distance of 100 feet, thus causing damage to plaintiff, the weight of such circumstantial evidence being for the jury. *Cleveland, etc., R. Co. v. Hayes*, 454, 461 (13).
40. *Objections.—Sufficiency.*—An objection, that defendant's counsel did not see how certain offered evidence was competent, is insufficient. *Hasper v. Weitcamp*, 371, 375 (7).
41. *Exclusion.—Harmless Error.—Interrogatories to Jury.*—Answers to the interrogatories to the jury showing certain facts in favor of defendant render harmless any error in excluding evidence tending to show such facts. *Indianapolis Traction, etc., Co. v. Kidd*, 402, 413 (15).
42. *Ambiguous.—Exclusion of.*—It is not error to refuse to permit a witness to answer an ambiguous, uncertain and indefinite question, especially where the witness had already testified to the substance of the fact sought to be shown. *Schmoe v. Cotton*, 364, 370 (13).
43. *Hypothetical Questions.—Failure to Supply Evidence of Details.—Duty of Adversary.*—Where a party propounds an hypothetical question on his agreement later to supply the evidence of the details thereof, and he fails to supply same, it is his opponent's duty, in order to present error thereon, to move to strike out the answers thereto, after the close of such party's evidence. *Flint & Walling Mfg. Co. v. Beckett*, 491, 505 (21).
44. *Receiving Incompetent, to Prove Established Fact.—Appeal and Error.*—The admission of incompetent evidence to prove a well-established fact in a case does not constitute reversible error. *Flint & Walling Mfg. Co. v. Beckett*, 491, 505 (22).

EXECUTION—

- Does not reach property held in trust by debtor, see **TRUSTS**, 4; *Ellison v. Ganiard*, 471, 488 (6).
- Property Liable to.—Exemptions.—Evidence.—Prima facie* all property of a debtor is subject to execution; and therefore proof that the conveyance in question was voluntary and without consideration, or made with fraudulent intent, establishes a *prima facie* case. *Stark v. Lamb*, 642, 646 (5).

EXECUTORS AND ADMINISTRATORS—

- Should settle estates, without regard to the heirs' right to contest will, see **DECEDENTS' ESTATES**; *Foley v. O'Donaghue*, 134, 138 (5).
- Personally liable on contract of waiver for street assessments made against decedent's property, see **CONTRACTS**, 4; *Hayes v. Shirk*, 569, 581 (20).
- Contracts of, to pay street assessments, do not grow "out of any matter connected with a decedent's estate," see **ACTION**, 1; *Hayes v. Shirk*, 569, 572 (1).
1. *Powers.—Decedents' Estates.*—Executors and administrators derive their powers from the will of the testator or from the statutes; and they have no general or implied powers beyond those necessary to carry out those expressly conferred. *Hayes v. Shirk*, 569, 578 (12).

EXECUTORS AND ADMINISTRATORS—Continued.

2. *Powers.—Personalty.*—In the absence of a testamentary provision to the contrary, an executor is entitled to all the decedent's personal property for the purpose of a settlement of the estate. *Hayes v. Shirk*, 569, 578 (13).
3. *Powers.—Contracts Concerning Decedents' Estates.*—Executors and administrators have no power to make a new and independent contract imposing a charge upon their decedents' estates, even though such estates would be benefited thereby. *Hayes v. Shirk*, 569, 578 (14).
4. *Decedents' Estates.—Contracts.—Personal Liability.*—The general rule is that a contract executed by an executor or administrator on behalf of his decedent's estate, for its sole benefit, and intended to bind it only, is void as to such estate, and imposes a personal liability upon such executor or administrator. *Hayes v. Shirk*, 569, 579 (15).

EXEMPTIONS—

See FRAUDULENT CONVEYANCES.

All property, *prima facie* liable to execution, see EXECUTION;
Stark v. Lamb, 642, 646 (5).

EXHIBITS—

See PLEADING.

EXPERTS—

See EVIDENCE, 19-23.

EXPRESS COMPANIES—

See CARRIERS; COMMERCE.

Regulation of, by State, see CONSTITUTIONAL LAW, 13-15.

May be enjoined from discriminating, see INJUNCTION, 1; *American Express Co. v. Southern Ind. Express Co.*, 292, 309 (2), 315 (2).

FACTORY ACT—

See MASTER AND SERVANT.

FIRES—

See RAILROADS.

FORECLOSURE—

See LIENS; MORTGAGES.

FORMER ADJUDICATION—

See JUDGMENT.

FRAUD—

See FRAUDULENT CONVEYANCES.

Answer of fraud, in action on contract, see PLEADING, 32; *Price v. Huddleston*, 536, 541 (7).

Relation to larceny, see CRIMINAL LAW, 8; *Towns v. State*, 315, 318 (3).

FRAUD—Continued.

Misrepresentations of the contents of a writing, not available as a defense, where defendant had the ability and opportunity to read same, before executing, see **CONTRACTS**, 6; *Price v. Huddleston*, 536, 542 (9).

In concealment of cause of action may precede, be concurrent with, or subsequent to, the accruing of such cause, see **ACTION**, 3; *Whitesell v. Strickler*, 602, 620 (25).

Of third party, no defense to suit by widow to set aside election not to take under will, see **WILLS**, 27; *Whitesell v. Strickler*, 602, 614 (14).

Effect of.—Judgment.—Fraud vitiates a judgment.

Steinmetz v. G. H. Hammond Co., 153, 156 (3).

FRAUDS, STATUTE OF—

See **CONTRACTS**, 7, 8, 13, 14.

FRAUDULENT CONVEYANCES—

1. *Setting Aside.—Joint Debts.—Legal Remedy against Part of Debtors.*—A creditor cannot resort to equity to set aside a fraudulent conveyance of one joint debtor and subject the property conveyed to the payment of his claim, where he has an adequate legal remedy for the collection of his claim from other joint debtors. *Stark v. Lamb*, 642, 645 (1).

2. *Setting Aside.—Legal Remedy against Joint Debtor.*—Special findings in a suit to set aside a fraudulent conveyance, showing that defendant fraudulently transferred his property to himself and wife; that he thereby became insolvent; that such transfer was made without consideration, and that the defendant's joint obligor was discharged in bankruptcy from the payment of such debt, support a conclusion of law that such conveyance should be set aside. *Stark v. Lamb*, 642, 645 (2).

3. *Setting Aside.—Subsequent Bankruptcy of Solvent Joint Debtor.*—The insolvency of defendant's joint debtor, subsequent to defendant's fraudulent conveyance of his property, does not preclude the plaintiff creditor from setting aside such conveyance and subjecting defendant's property to the payment of his debts. *Stark v. Lamb*, 642, 645 (3).

4. *Evidence.*—To set aside a conveyance as fraudulent, the plaintiff must prove facts which either directly or by inference show that such conveyance was made with a fraudulent intent. *Stark v. Lamb*, 642, 646 (4).

5. *Sales.—Exempt Property.*—A debtor's conveyance cannot be set aside as fraudulent, where his property is not subject to execution, being exempt by law. *Stark v. Lamb*, 642, 647 (6).

6. *Setting Aside.—Exemptions.—Presumptions.*—Where the proof shows that the debtor had less than the amount of property which he might claim as exempt, the presumption is that he claims such exemption, and it is the duty of the court to find that such conveyance was not fraudulent.

Stark v. Lamb, 642, 647 (7).

7. *Setting Aside.—Exemptions.—Evidence.—General Denial.*—Under the general denial to a suit to set aside a conveyance as fraudulent, evidence is admissible to show that the defendant's property at the time of the conveyance was not subject to execution, and therefore the conveyance was not fraudulent.

Stark v. Lamb, 642, 647 (8).

FRAUDULENT CONVEYANCES—Continued.

8. *Exemptions.—Special Findings.*—The absence of a special finding that the alleged fraudulent conveyance covered property which was exempt by law, leaves a presumption that the court in finding that the conveyance was made with intent to defraud his creditors, found such fact in view of the law giving such creditor a right to transfer his exempt property without being subject to the imputation of fraud.

Stark v. Lamb, 642, 648 (9).

GRAVEL ROADS—

See **HIGHWAYS**.

HABEAS CORPUS—

1. *To Release Prisoner.—Collateral Attack.*—An attempt by *habeas corpus*, to obtain the release of a person in custody under the judgment of a court is a collateral attack on the judgment of such court. *Ryan v. Rhodes*, 121, 124 (2).
2. *Correcting Errors.—Appeal and Error.*—The writ of *habeas corpus* cannot be used to correct the errors a court may have made in its judgment committing the plaintiff.

Ryan v. Rhodes, 121, 124 (3).

HIGHWAYS—

See **JUDGMENT**, 11-14; **RAILROADS**.

Allegations necessary to show obstruction calculated to frighten horse, see **PLEADING**, 33; *Baltimore, etc., R. Co. v. Slaughter*, 330, 341 (12).

Perjury in affidavit of non-collusion in contracts for construction of, see **INDICTMENT AND INFORMATION**, 10; *State v. Dorsey*, 199, 204 (6).

Evidence in suits to enjoin opening of, see **EVIDENCE**, 24-26; *Todd v. Crail*, 48.

Legislature may create taxing districts for construction of, see **CONSTITUTIONAL LAW**, 17, 18; *Spaulding v. Mott*, 58, 66 (6), 67 (7).

Affidavit of non-collusion, not necessary in bidding on construction of free gravel roads, see **CONSTITUTIONAL LAW**, 16; *State v. Dorsey*, 199, 204 (5).

1. *Gravel Roads.—Construction.—Bids.—Boards of Commissioners.—Statutes.*—Boards of commissioners are authorized to give notice and receive bids for the construction of free gravel roads by §6901 Burns 1901, Acts 1901, p. 449, §3, and not by §5594q1 Burns 1901, Acts 1899, p. 343, §37, providing that certain specifications shall be filed in the auditor's office and that certain notices shall be given before boards of commissioners shall let contracts for the construction of any public undertaking.

State v. Dorsey, 199, 202 (1).

2. *Gravel Roads.—Construction.—County Work.—Statutes.*—Under the act of 1877 (Acts 1877 [s. s.], p. 29, §1, §4246 R. S. 1881) it was uniformly held that the boards of commissioners, in the construction of free gravel roads, were engaged in a county business.

State v. Dorsey, 199, 203 (3).

3. *Gravel Roads.—Construction.—County Work.—Statutes.*—Under §5592 Burns 1901, Acts 1899, p. 170, §4, boards of county commissioners, in the construction of free gravel roads, are engaged in a county business. *State v. Dorsey*, 199, 204 (4).

HIGHWAYS—Continued.

4. *Gravel Roads.—Within Two Miles of County Line.—Taxing Districts.—Statutes.*—The manner of giving notice of the filing of a petition, the time and place of hearing, the report of the viewers and procedure outlined, clearly indicate that the gravel road act of 1903 (Acts 1903, p. 255) did not create a taxing district composed of lands in separate counties.
Spaulding v. Mott, 58, 62 (1).
5. *Gravel Roads.—Statutes.—Construction.—Prior Statutes.*—In construing the gravel road act of 1903 (Acts 1903, p. 255) the courts will give weight to the fact that the similar act of 1877 (Acts 1877, p. 82) was uniformly construed and enforced by the proper officers as authorizing the construction of gravel roads up to the county lines without any attempt to assess the lands in the adjoining county within the statutory limit for the taxing district.
Spaulding v. Mott, 58, 62 (2).
6. *Gravel Roads.—Prior Statutes.—Construction.—Presumptions.*—The presumption is that in passing the gravel road act of 1903 (Acts 1903, p. 255) the legislature had in mind the construction placed upon the prior, similar statute of 1877 (Acts 1877, p. 82), which authorized such roads to be built up to the county lines without attempting to assess lands in the adjoining county within the statutory limit for the taxing district.
Spaulding v. Mott, 58, 64 (3).
7. *Gravel Roads.—Taxing Districts.—Statutes.*—The fact that the gravel road act of 1877 (Acts 1877, p. 82) provided that no such road should be constructed unless a majority in number of owners and the owners of a majority in acreage of the lands assessable should petition therefor, and the gravel road act of 1903 (Acts 1903, p. 255) provides that it shall only be necessary for a majority of the abutters so to sign, does not show a legislative intent to change the method of fixing the taxing districts therefor.
Spaulding v. Mott, 58, 64 (4).
8. *Gravel Roads.—Taxing Districts.*—The gravel road act of 1865 (Acts 1865, p. 90), providing for a taxing district three-fourths of a mile distant from the proposed road, outside of the corporate limits of towns and cities, the assessments to be made on the valuation in the auditor's books, did not extend such taxing district across county lines, though the road might be nearer the county line than three-fourths of a mile.
Spaulding v. Mott, 58, 65 (5).
9. *Gravel Roads.—Width.—Viewers' Report.—Statutes.*—A failure of the viewers' report to show the necessity for the widening of a public highway to make a gravel road thereof under the act of 1903 (Acts 1903, p. 255) does not prevent the board of commissioners from widening same, the statute making no provision requiring the viewers to report on such fact. *Gipson v. Heath*, 98 Ind. 100, and *Crow v. Judy*, 139 Ind. 562, distinguished.
Spaulding v. Mott, 58, 70 (11).
10. *Gravel Roads.—Widening.—Procedure.*—The gravel road act of 1903 (Acts 1903, p. 255) requires the viewers first to determine whether a highway shall be widened or laid out on new ground and then that the board of commissioners shall finally settle such question.
Spaulding v. Mott, 58, 71 (12).
11. *Gravel Roads.—Public Utility.—Appeal.*—Under the gravel road act of 1903 (Acts 1903, p. 255, §14) the decision of the board of commissioners that a proposed gravel road is of

HIGHWAYS—Continued.

public utility is final; and an appeal to the circuit court cannot put such question in issue in such court.

Spaulding v. Mott, 58, 71 (13).

12. *Gravel Roads.—Widening.—Evidence.—Sufficiency.—Exclusion on Appellant's Motion.—Estoppel.*—Appellant is estopped to question the jury's finding of a certain fact, when upon his motion the adverse party's material evidence thereof was improperly excluded.

Spaulding v. Mott, 58, 71 (14).

HOMICIDE—

See **CRIMINAL LAW**.

Instructions as to self-defense, see **TRIAL**, 19, 20; *Weston v. State*, 324, 327 (3), 329 (7).

1. *Manslaughter.—Assault and Battery.—Death Resulting.*—The defendant's commission of an unlawful assault and battery upon deceased, resulting in his death, constitutes manslaughter.

Weston v. State, 324, 326 (1).

2. *Misadventure.—Assault and Battery.—Justifiable.*—The defendant's commission of a justifiable assault and battery upon deceased, resulting in his death, constitutes a homicide by misadventure.

Weston v. State, 324, 327 (2).

HORSES—

See **ANIMALS**.

HUSBAND AND WIFE—

See **WILLS**.

Husband not a proper party in a proceeding to commit the wife to the industrial school for girls, see **PARTIES**, 2; *Ryan v. Rhodes*, 121, 124 (4).

Wife may recover doctors' bills in personal injury case, where she is personally liable therefore, see **DAMAGES**, 2; *Indianapolis Traction, etc., Co. v. Kidd*, 402, 414 (18).

INDICTMENT AND INFORMATION—

See **CRIMINAL LAW**.

1. *Assault and Battery with Intent.*—An affidavit charging that defendant did "unlawfully, feloniously, purposely and with premeditated malice, and in a rude, insolent and angry manner, unlawfully and feloniously touch, cut, beat and strike with his fist, and with a knife, * * * with the intent then and there and thereby him, the said Harry Wolfe, unlawfully, purposely and with premeditated malice to kill and murder," does not state an offense, since it fails to show that any person was assaulted.

Padgett v. State, 179, 180 (1).

2. *Motion in Arrest.—Criminal Law.*—An affidavit containing all of the essentials of a crime, though the facts are defectively charged, is good on motion in arrest of judgment, such defects being reached only by a motion to quash.

Padgett v. State, 179, 182 (3).

3. *Motion in Arrest.—Motion to Quash.*—An affidavit omitting an essential fact of the crime charged is bad on motion to quash or on a motion in arrest of judgment.

Padgett v. State, 179, 181 (2).

INDICTMENT AND INFORMATION—Continued.

4. *Certainty.—Statutes.*—Under §§1832, 1833 Burns 1905, Acts 1905, pp. 584, 625, §§191, 192, providing as to the sufficiency, and against the quashing of, defective affidavits and indictments, reasonable certainty is necessary in charging a crime.
Padgett v. State, 179, 182 (4).
5. *Names of Injured Persons.—Identification.*—The names of the injured person, or a sufficient reason for the failure to give same, where required in the indictment or information, must be set out in order to identify the transaction, the omission thereof rendering such charge bad on motion to quash or on motion in arrest.
Padgett v. State, 179, 183 (5).
6. *Intendments.—Doubts.*—No intendments are made in aid of a criminal charge, and all doubts are resolved in favor of the accused.
Padgett v. State, 179, 184 (6).
7. *Statutes.—Charging in Language of.—When Sufficient.*—Where a statute in defining a crime sets out all of the elements thereof, it is sufficient for the indictment to follow the language thereof, but where the statute omits an element of the crime, or has been narrowed by judicial construction so that an indictment in the language thereof would be uncertain, a charging in the language of the statute is insufficient.
Vinnedge v. State, 415, 417 (1).
8. *Inferences.*—An indictment charging facts only by inference is insufficient.
Vinnedge v. State, 415, 418 (2).
9. *Form.—Embezzlement.*—An indictment for embezzlement charging that defendant was an employe "and as such employe then and there had control and possession of" \$98.25, the property of his employer, is insufficient, since it fails to show by a direct allegation that his possession was by virtue of his employment.
Vinnedge v. State, 415, 419 (5).
10. *Perjury.—Highways.—Gravel Roads.—Bids.—Affidavits of Non-Collusion.*—An indictment charging that defendant committed perjury under §2093 Burns 1901, §2006 R. S. 1881, providing that a party making a false affidavit in any proceeding where an affidavit is required by law, shall be guilty of perjury, by the filing of his false affidavit of non-collusion with his bid for the construction of a free gravel road, is bad, since no such affidavit is required by law in such a case.
State v. Dorsey, 199, 204 (6).

INJUNCTION—

1. *Express Companies.—Discrimination.—Statutes.*—Injunction lies, by virtue of §3312e Burns 1901, Acts 1901, p. 149, §4, to compel defendant express company to grant to plaintiff express company the same terms and privileges in the carriage of plaintiff's express matter, which defendant grants to other companies.
American Express Co. v. Southern Ind. Express Co., 292, 309 (2), 315 (2).
2. *Temporary.—Evidence.—Affidavits.—Information and Belief.*—It is sufficient, where a temporary injunction is prayed, for the plaintiff to file his affidavit setting forth the facts upon information and belief, supported by an affidavit of the facts by some person cognizant thereof.
Spurgeon v. Rhodes, 1, 7 (1).

INJUNCTION—Continued.

3. *Temporary.—Evidence.—Affidavits.—Information and Belief.—No Denial.*—A temporary injunction may be granted upon plaintiff's affidavit upon information and belief where the defendant, after notice, fails to deny the truth of the matters alleged.
Spurgeon v. Rhodes, 1, 7 (2).
4. *Temporary.—Evidence.—Complaint.*—Mere allegations in a complaint, of apprehensions or fears, unsupported by proof will not sustain an injunction.
Spurgeon v. Rhodes, 1, 7 (3).
5. *Temporary.—Evidence.—Discovery.—Information and Belief.*—Plaintiff in an application for a temporary injunction is entitled to a discovery from defendant upon setting out the facts upon information and belief; and if defendant, after opportunity given, fails to deny same, the court may grant such injunction.
Spurgeon v. Rhodes, 1, 8 (4).
6. *Temporary.—State Board of Medical Registration and Examination.—Physicians.—License.*—Plaintiff's affidavit upon information and belief that the state board of medical registration and examination has conspired with the prosecuting witness to have charges filed against him, and that such board will revoke his license without any trial, supported by an affidavit of certain alleged admissions by the board's attorney, does not sustain a temporary injunction, where the members of such board by affidavits deny the allegations against them, and their attorney likewise denies such alleged admissions.
Spurgeon v. Rhodes, 1, 9 (5).
7. *Temporary.—Prosecuting Witness Outside of State.—Effect.*—The fact that the prosecuting witness is outside of the State is no ground for an injunction to prevent the State Board of Medical Registration and Examination from trying the plaintiff, a licensed physician, upon the charge of immoral conduct, in a proceeding to revoke his license.
Spurgeon v. Rhodes, 1, 9 (6).

INSANITY—

Evidence of, see EVIDENCE, 20; *Heaston v. Krieg*, 101, 120 (28).

INSTRUCTIONS—

See TRIAL, 12-34.

INSURANCE—

Answer in avoidance of policy, see PLEADING, 41; *Glens Falls Ins. Co. v. Michael*, 659, 679 (16).

1. *Marine.—Disclosures.*—It is the duty of the insured, in a marine policy, to disclose to his insurer all facts within his knowledge which would tend to increase the hazard, and a failure so to do ordinarily avoids such policy.
Glens Falls Ins. Co. v. Michael, 659, 665 (1).
2. *Fire.—Disclosures.*—It is not the duty of assured, in a fire policy, to make disclosures as to the risk, there being no fraud practiced, since the insurer may examine the property insured and can make and verify inquiries in reference to such risk.
Glens Falls Ins. Co. v. Michael, 659, 666 (2).
3. *Policies.—Construction.—Contracts.*—Insurance policies, which contain inconsistent provisions, or which are so framed as

INSURANCE—Continued.

to be fairly open to construction, will be construed so as to sustain, rather than defeat, the insurance.

Glens Falls Ins. Co. v. Michael, 659, 666 (3).

4. *Fire Policies.—Void Clauses.—Representations.*—In the absence of fraud, a fire policy which provides that it "shall be void if the insured has concealed * * * any material fact; * * * or if the interest of the insured in the property be not truly stated herein," or "if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple," is not void, although assured had a life estate only, no representations having been made by assured to the insurer and no questions being asked by such insurer. Anything to the contrary in *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, disapproved. Gillett, J., dissenting.

Glens Falls Ins. Co. v. Michael, 659, 666 (4), 699 (4), 705 (4).

5. *Policies.—Construction.—Inequality of Parties.*—Insurance policies prepared by experts with a view of safeguarding the insurer at all points, and with the execution and provisions of which the assured had nothing to do, and the import of many of the provisions of which he cannot fully comprehend, should not be construed and enforced as contracts where the parties deal on an equal footing with each other.

Glens Falls Ins. Co. v. Michael, 659, 677 (5).

6. *Policies.—Mutuality of Contracts.*—The meeting of the minds of the parties, essential to the ordinary contract, is usually wanting in fact as to many of the provisions in insurance policies, the assured's assent thereto being largely a legal fiction. *Glens Falls Ins. Co. v. Michael*, 659, 677 (6), 704 (6).

7. *Fire.—Insurable Interest.—Life Tenants.*—Life tenants have an insurable interest in the house situate upon their land.

Glens Falls Ins. Co. v. Michael, 659, 677 (7).

8. *Policies.—Validity.—Presumptions.*—Where the insurer issues a fire policy to life tenants, and they pay the premium and the insurer accepts and retains same, the presumption is that the parties in good faith intended to effect a valid contract.

Glens Falls Ins. Co. v. Michael, 659, 677 (8).

9. *Policies.—Title of Assured.—Failure to Inquire About.—Presumptions.*—Where the insurer issues a fire policy to life tenants without inquiring as to the title, the presumption is that the insurer is satisfied as to the conditions of the title and voluntarily issues the policy regardless thereof.

Glens Falls Ins. Co. v. Michael, 659, 678 (9).

10. *Policies.—Provisions Broken.—Waiver.*—A provision in a fire policy which is violated to the insurer's knowledge at the taking effect of such policy, is waived.

Glens Falls Ins. Co. v. Michael, 659, 678 (10).

11. *Policies.—"Void" Clauses.—Voidable.*—The word "void" as used in clauses in an insurance policy means voidable at the election of the insurance company.

Glens Falls Ins. Co. v. Michael, 659, 678 (11).

12. *Policies.—Void.—Effect.*—A void insurance policy is binding on nobody.

Glens Falls Ins. Co. v. Michael, 659, 678 (12).

INSURANCE—Continued.

13. *Policies.—Voidable.—Avoidance of.—Election.*—An insurer, acting with reasonable diligence, has the right to avoid its policy for a condition broken, or it may elect to continue such policy in force, regardless thereof.
Glens Falls Ins. Co. v. Michael, 659, 678 (13).
14. *Policies.—Breach of Condition.—Election.*—Where a fire policy provided that it should be void in case the assured had other than a fee-simple title to the land on which the insured building stood, and the assured had a life estate only, it was the insurer's duty upon discovery of that fact to make its election whether it would avoid such policy or continue it in force.
Glens Falls Ins. Co. v. Michael, 659, 679 (14).
15. *Policies.—Avoidance.—Notice.—Return of Premium.*—Where an insurance company learns of a condition broken in its policy, it must, with reasonable promptness after learning of the breach, notify the assured of such avoidance and the reasons therefor and return to him the unearned premium.
Glens Falls Ins. Co. v. Michael, 659, 679 (15).
16. *Policies.—Voidable.—Retention of Premium.*—The retention of the premium paid for an insurance policy, with knowledge of a condition broken, is an election to treat such policy as valid and not to insist upon a forfeiture.
Glens Falls Ins. Co. v. Michael, 659, 679 (17).
17. *Fire.—Life Tenants.—Measure of Loss.*—The measure of loss suffered by life tenants in the destruction of their house, covered by a fire policy, is the value of the insured property when tested by such interest.
Glens Falls Ins. Co. v. Michael, 659, 703 (20).
18. *Conduct.—Notice.—Waiver.*—An insurance company is chargeable with notice of its own conduct, and a waiver can be manifested by conduct as well as by words.
Glens Falls Ins. Co. v. Michael, 659, 704 (21).
19. *Voidable.—Premiums.—Recovery.*—The premium paid for a voidable insurance policy cannot be recovered by the assured, the right of avoiding such policy resting solely with such company.
Glens Falls Ins. Co. v. Michael, 659, 704 (22).

INTENT—

See CRIMINAL LAW.

INTERLOCUTORY ORDERS—

See JUDGMENT.

INTERROGATORIES TO JURY—

See TRIAL, 36-47.

On *venire de novo*, no question can be raised on interrogatories, see PLEADING, 49; *Spaulding v. Mott*, 58, 72 (17).

INTERSTATE COMMERCE—

See COMMERCE.

INTERURBAN RAILROADS—

See RAILROADS.

Complaint in cases of injuries in alighting from, see PLEADING, 75-77; *Indiana, etc., Traction Co. v. Jacobs*, 85.

Evidence to establish owner and operator thereof, see EVIDENCE, 27; *Indiana, etc., Traction Co. v. Jacobs*, 85, 92 (7).

Procedure in appropriating land, see EMINENT DOMAIN, 2-4; *Terre Haute, etc., R. Co. v. Indianapolis, etc., Co.*, 193.

Appeals from order fixing point of crossing of railroad, see APPEAL AND ERROR, 59; *Terre Haute, etc., R. Co. v. Indianapolis, etc., Co.*, 193, 196 (3).

Appeals from boards of commissioners in cases of subsidy elections, see APPEAL AND ERROR, 10, 11; *Good v. Burk*, 462, 466 (7), 467 (9).

1. *Carriers.—Defective Place for Alighting.—Negligence.—Question for Jury.*—Whether an elderly woman was guilty of contributory negligence in alighting, unassisted, from an interurban car on a dark night at a defective place, of which defects she had an imperfect knowledge, is a question for the jury.
Indiana, etc., Traction Co. v. Jacobs, 85, 89 (3).

2. *Place of Alighting.—Presumptions.*—In the absence of notice to the contrary, a passenger has the right to assume that the carrier has stopped at a place where, with due care, she can alight with safety.

Indiana, etc., Traction Co. v. Jacobs, 85, 95 (15).

INTOXICATING LIQUORS—

See CONSTITUTIONAL LAW, 19-21; WORDS AND PHRASES, 6-8.

Construction of statutes relating thereto, see STATUTES, 12, 13; *Kunkle v. Abell*, 434, 438 (3), (4).

1. *Remonstrance.—Signatures.—Sufficiency.*—A remonstrance, under §7283i Burns 1901, Acts 1895, p. 248, §9, against the granting of a license to sell intoxicating liquors, is sufficient though signed by the surnames and initials of the Christian names only of the remonstrators. *Good v. Burk*, 462, 465 (3).

2. *Remonstrance.—Statutes.—Claiming Benefits of.*—A litigant claiming the benefits of a statutory provision must bring himself clearly within such provision.

Jones v. Alexander, 395, 397 (2).

3. *License.—Applications.—Remonstrance.—Practice.*—An applicant for a license to retail intoxicating liquors is entitled to a trial as to the sufficiency of his application and as to the validity of a remonstrance filed against the granting of such license, though such remonstrance was filed at a previous term of the commissioners' court and by them adjudged sufficient to bar all applicants. *Kunkle v. Abell*, 434, 440 (5).

4. *License.—Remonstrance.—Burden of Proof.—Evidence.—Statutes.*—Under §7283i Burns 1905, Acts 1905, p. 7, the burden of proof that a remonstrance was filed against the granting of license to sell intoxicating liquors at retail, is upon the remonstrators, and the *ex parte* order of the board of commissioners that remonstrance theretofore filed contained a majority of the electors concerned is not evidence of such fact.

Jones v. Alexander, 395, 397 (1).

INTOXICATING LIQUORS—Continued.

5. *License.—Remonstrance.—Appeal and Error.*—An appeal from a judgment of the board of commissioners dismissing an application for the sale of intoxicating liquors is not from the *ex parte* prior proceeding adjudging sufficient a remonstrance theretofore filed against the issuing of any license in the appellant's township or ward. *Lanham v. Woods*, 398, 401 (2).
6. *License.—Remonstrance.—Procedure.*—Remonstrants under §7283i Burns 1905, Acts 1905, p. 7, are adverse parties to an applicant for liquor license subsequently filing an application in the township or ward covered by such remonstrance; and such applicant is entitled to a hearing on his application and to question the validity of such remonstrance.
Lanham v. Woods, 398, 401 (3).
7. *Application.—Remonstrance.—Appeal and Error.*—Under §7280 Burns 1901, Acts 1889, p. 288, applicants and remonstrants in proceedings to obtain liquor licenses have the right of appeal from an adverse decision.
Lanham v. Woods, 398, 401 (4).
8. *Illegal Sales.—Statutes.*—The person selling, without a license; intoxicating liquors in quantities of a quart or more at a time under the act of 1875 (Acts 1875 [s. s.], p. 55), as amended by the act of 1897 (Acts 1897, p. 253), could be prosecuted only under §2186 Burns 1901, §2090 R. S. 1881, making it punishable to do business without a license, where a license is required.
State v. Bock, 559, 562 (1).
9. *Sales to Consumers.—Statutes.*—The purpose of the liquor license law of 1875 (Acts 1875 [s. s.], p. 55) was to regulate the sales of liquors to consumers, and not to regulate sales by wholesalers to retailers or jobbers.
State v. Bock, 559, 563 (2).
10. *Wholesalers.—License.—Statutes.*—The act of 1875 (Acts 1875 [s. s.], p. 55), as amended by the act of 1897 (Acts 1897, p. 253), has no application to wholesalers who sell to retailers, jobbers or consumers in quantities of five gallons or more at a time.
State v. Bock, 559, 564 (6).
11. *License Law of 1875.—To Whom Applicable.*—The act of 1875 (Acts 1875 [s. s.], p. 55), providing that all persons desiring to retail liquors, to be used as a beverage, in quantities of less than a quart at a time, should secure a license therefor, applied only to retailers who sold to consumers.
State v. Bock, 559, 564 (7).
12. *Sales of Five Gallons.—Delivery of Part.*—A sale of five gallons of intoxicating liquors, a part only of which is delivered at the time, or removed from the premises, is unlawful, unless the seller has a retailer's license.
State v. Bock, 559, 568 (11).
13. *Sales.—Use of, on Premises of Seller.*—Sales by an unlicensed vendor of intoxicating liquors, in any quantity, to be used on premises under the vendor's control, are unlawful as in violation of §7285 Burns 1901, §5320 R. S. 1881.
State v. Bock, 559, 569 (12).

INVITATION—

See WORDS AND PHRASES.

JUDGES—

See COURTS.

Appointment of attorney, consulted by defendant, as special judge, see COURTS, 5; *Juliana v. State*, 421, 424 (2).

Cannot decide their own cases, see CONSTITUTIONAL LAW, 11; *Carr v. Duhme*, 76, 79 (4).

Waiver of right to object to the appointment of special judge, see ACTION, 4; *Whitesell v. Strickler*, 602, 620 (26).

JUDGMENT—

See APPEAL AND ERROR; JURISDICTION.

Appeals from interlocutory orders, see APPEAL AND ERROR, 4-9.

Motion to modify, see PLEADING, 44; *Ditchey v. Lee*, 267, 276 (12).

Pleading in actions upon, or affecting, see PLEADING, 34-38.

Habeas corpus is a collateral attack, see HABEAS CORPUS, 1; *Ryan v. Rhodes*, 121, 124 (2).

Vitiated by fraud, see FRAUD; *Steinmetz v. G. H. Hammond Co.*, 153, 156 (3).

Justices of the peace and city courts have no jurisdiction to set aside for fraud, see COURTS, 11, 12; *Steinmetz v. G. H. Hammond Co.*, 153, 157 (5), (6).

By judge disqualified by statute, void, see COURTS, 2; *Carr v. Duhme*, 76, 81 (16).

Costs may be apportioned, where proper, see COSTS, 2, 3; *Whitesell v. Strickler*, 602, 621 (27), (28).

Supreme Court has power to revise, see APPEAL AND ERROR, 62, 63; *Aiken v. City of Columbus*, 139, 151 (15), 152 (16).

What is final, in interurban railroad subsidy case, see APPEAL AND ERROR, 60; *Good v. Burk*, 462, 468 (10).

Order of circuit court remanding a case to the board of commissioners, is final, see APPEAL AND ERROR, 58; *Carr v. Duhme*, 76, 79 (2).

Decree of superior court in an equity case appealed from a city court, will be reversed with an order to dismiss, see APPEAL AND ERROR, 57; *Steinmetz v. G. H. Hammond Co.*, 153, 159 (9).

Is of no binding force, when vacated by an appeal, see APPEAL AND ERROR, 56; *Taylor v. Strayer*, 23, 29 (5).

Parties bound by the substantive law announced in decision on appeal, see APPEAL AND ERROR, 55; *State, ex rel., v. Board, etc.*, 276, 289 (14).

Will be reversed, where it rests on good and bad paragraphs of complaint and the record fails to show upon which, see APPEAL AND ERROR, 54; *City of Decatur v. McKean*, 249, 260 (10).

1. *Irregularities.—Collateral Attack.*—Where the court has jurisdiction, its actions, though irregular or erroneous, are not subject to a collateral attack. *Todd v. Crail*, 48, 54 (5).

2. *Collateral Attack.—Industrial School for Girls.—Commitment.*—The judgment, though erroneous, of a court of superior jurisdiction committing a married girl under fifteen years of age to the Indiana Industrial School for Girls under the act of 1903 (Acts 1903, p. 91) is not subject to a collateral attack, where the court had jurisdiction over the person.

Ryan v. Rhodes, 121, 123 (1).

JUDGMENT—Continued.

3. *Collateral Attack.—Issues.—Questions Capable of Litigation.*—All questions which might have been litigated under the issues in a cause are conclusively settled by the judgment therein as against a collateral attack. *Ryan v. Rhodes*, 121, 126 (5).
4. *Finding.—Elections.—Contest.—Candidates.—Bribery.*—A finding in an election contest, that the contestee bribed divers electors of his township to vote for him for township trustee sustains a judgment declaring such office vacant.. *Tinkle v. Wallace*, 382, 393 (16).
5. *Interlocutory.—Eminent Domain.—Interurban Railroads.—Place of Crossing.*—An order of the circuit court under §5464a Burns 1905, Acts 1903, p. 125, §1, providing for the crossing of a steam railroad by interurban railroads, fixing the location of the crossing, but not finally determining other issues in the case, is interlocutory.
Terre Haute, etc., R. Co. v. Indianapolis, etc., Co., 193, 198 (6).
6. *Final.—Eminent Domain.—Interurban Railroads.—Awards.—Appeal.—Exceptions.*—A judgment of the court on the exceptions to an award and which disposes of all questions presented is a final judgment from which an appeal will lie.
Terre Haute, etc., R. Co. v. Indianapolis, etc., Co., 193, 199 (7).
7. *Final.—What is.—Appeal and Error.*—A final judgment is one that disposes of the case as to all parties and ends the litigation; and, with certain exceptions, only such judgments may be appealed from.
Terre Haute, etc., R. Co. v. Indianapolis, etc., Co., 193, 197 (4).
8. *Final.—Legislative Power to Annul.*—A final judgment, rendered in an action based upon a purely statutory right, cannot be arbitrarily set aside or annulled by the legislature.
Taylor v. Strayer, 23, 29 (6).
9. *Final.—Drains.—Board of Commissioners.—Appeal.*—Where an appeal is taken from an order of the board of commissioners in a ditch proceeding, the establishment, if at all, of such ditch must be by order of the circuit court, either directly or by remanding the cause with directions to such board.
Taylor v. Strayer, 23, 29 (8).
10. *Setting Aside for Fraud.—Courts.—Jurisdiction.*—Circuit and superior courts have jurisdiction to set aside and annul judgments obtained by fraud.
Steinmetz v. G. H. Hammond Co., 153, 157 (4).
11. *Validity.—Highways.—Width.—Viewers' Report.—Approval.*—A judgment of the board of commissioners establishing a gravel road, but failing to set out its width in the judgment, is not void where it expressly approved the viewers' report, which did set out its width, and ordered the construction in accordance therewith.
Todd v. Crail, 48, 55 (7).
12. *Boards of Commissioners.—Technical Accuracy.*—Technical accuracy is not required in the orders and judgments of the boards of commissioners, and if substantially good, they cannot be collaterally attacked.
Todd v. Crail, 48, 57 (8).

JUDGMENT—Continued.

13. *Validity.—Highways.—Width.*—A judgment of the board of commissioners establishing a gravel road, but not stating the width thereof, is not void, where such judgment approves and makes a part thereof a viewers' report which does state such width.
Spaulding v. Mott, 58, 68 (9).
14. *Validity.—Highways.—Gravel Roads.—Taxing Districts.—Failure to Assess Part of Lands.*—A failure to assess all of the lands in a gravel road taxing district for the cost thereof does not render void the judgment establishing same, since the statute (Acts 1903, p. 255, §12, 3) requires only that the lands benefited shall be assessed. *Greensburgh, etc., Turnpike Co. v. Sidener*, 40 Ind. 424, distinguished.
Spaulding v. Mott, 58, 68 (10).
15. *Motion to Modify.—Express Companies.—Equal Privileges.—Statutes.*—A decree commanding defendant express company to grant certain specified privileges and terms to plaintiff express company, such privileges and terms being the same voluntarily yielded by defendant to other express companies, is warranted by §3312e Burns 1901, Acts 1901, p. 149, §4.
American Express Co. v. Southern Ind. Express Co., 292, 315 (12).
16. *Res Judicata.—Subject-Matter.—Parties.—Issues.*—To constitute a prior judgment *res judicata* the subject-matter of the particular issue in the pending suit must be the same as in the prior suit, and the parties, or their privies, to the present suit must have been adverse parties to such issue in the prior suit.
Johnson v. Knudson-Mercer Co., 429, 432 (3).
17. *Res Judicata.—Issues.—Test.*—To constitute a prior judgment *res judicata* the particular issue in the present suit must have been determined in the prior suit, the test being whether the same evidence would sustain both the present and former issues, difference in the form of the suits being immaterial.
Johnson v. Knudson-Mercer Co., 429, 432 (4).
18. *Res Judicata.—Replevin.—Damages.*—A judgment in replevin is conclusive upon the parties and their privies, in an action on the replevin bond, as to all matters capable of litigation under the issue
Jackson v. Morgan, 528, 532 (3).
19. *Res Judicata.—Replevin.—Failure to Find on all Issues.*—A failure of the verdict and judgment, in replevin, to show the value of the property and the damages for detention thereof, is not *res judicata* that there were none, in an action upon the replevin bond; and such questions remain open.
Jackson v. Morgan, 528, 533 (7).
20. *Res Judicata.—Replevin.—Value of Property.*—A judgment for defendant in a replevin action for the return of the property, and, in case return is not made, for the value thereof, is *res judicata*, as to such value, in a subsequent action on plaintiff's replevin bond.
Jackson v. Morgan, 528, 534 (8).
21. *Res Judicata.—Replevin.—Damages.—Time for Which Given.*—A judgment for damages, in an action of replevin, is *res judicata*, in an action on the replevin bond, as to the damages up to the time of the trial.
Jackson v. Morgan, 528, 534 (9).

JUDGMENT—Continued.

22. *Res Judicata*.—*Replevin*.—*Damages*.—Where defendant in a replevin action recovered a judgment for the return of the property, and, in case that could not be had, an alternative judgment for the value thereof, a subsequent action for other damages accruing before such trial cannot be maintained.
Jackson v. Morgan, 528, 535 (11).
23. *Defects*.—*Remedy*.—*Replevin*.—*Damages*.—Defects in the assessment of damages in an action in replevin cannot be corrected in a subsequent action on the replevin bond.
Jackson v. Morgan, 528, 535 (12).
24. *Res Judicata*.—*What Questions are*.—A judgment is *res judicata* as to all matters litigated, or which, under the issues formed, might have been litigated.
Whitesell v. Strickler, 602, 615 (15).
25. *Res Judicata*.—*Parties to the Issue*.—Rights of defendants as among themselves are not determined in an action wherein no cross pleadings are filed, a determination of such questions as to the plaintiff being insufficient to adjudicate their rights as to each other.
Whitesell v. Strickler, 602, 616 (16).
26. *Res Judicata*.—*Parties*.—*Issues*.—To be *res judicata*, a former judgment must have been between the same parties and upon the same issue.
Whitesell v. Strickler, 602, 616 (17).
27. *Res Judicata*.—*Wills*.—*Widow's Election*.—*Setting Aside*.—*Decedents' Estates*.—*Sales to Pay Debts*.—A judgment in a suit by an administrator, against the widow and other heirs, to sell his decedent's real estate to pay debts, is not *res judicata* in a subsequent suit by such widow to set aside her election to renounce the provisions of her husband's will, where no issues were formed between her and the other heirs in such former suit.
Whitesell v. Strickler, 602, 616 (18).
28. *Res Judicata*.—*Partition*.—*Wills*.—*Widow's Election*.—*Setting Aside*.—A judgment in a suit for partition brought by the widow and three other heirs against a fourth heir of decedent, wherein no issues were formed as among the plaintiffs, is not *res judicata* as to a subsequent suit by plaintiff to set aside her election to renounce the provisions of her husband's will.
Whitesell v. Strickler, 602, 617 (19).
29. *Verdict*.—*General*.—*Answers to Interrogatories*.—*When Controlling*.—The answers to the interrogatories to the jury control the general verdict only where the antagonism between them is so great that no evidence admissible under the issues could harmonize them.
Indianapolis Traction, etc., Co. v. Kidd, 402, 409 (9).

JUDICIAL NOTICE—

See EVIDENCE, 28-30.

JURISDICTION—

See APPEAL AND ERROR.

Of equity, legislature has power to enlarge, see EQUITY; *American Express Co. v. Southern Ind. Express Co.*, 292, 310 (3).

Courts have, to determine which set of nominations should be placed on the ballot as candidates of a party, see ELECTIONS, 6; *State, ex rel., v. Board, etc.*, 276, 285 (7).

JURISDICTION—Continued.

In drainage proceedings, see **DRAINS**, 10; *Carr v. Duhme*, 76, 79 (3).

City courts have not, in equity cases, see **COURTS**, 11, 12; *Steinmetz v. G. H. Hammond Co.*, 153, 157 (5), (6).

Of appeals from railroad commission, in Appellate Court, see **APPEAL AND ERROR**, 80, 81; *Grand Rapids, etc., R. Co. v. Railroad Com., etc.*, 214, 217 (4); *Grand Trunk, etc., R. Co. v. Railroad Com., etc.*, 261, 262 (2).

Question of, as to subject-matter, may be raised at any time, see **TRIAL**, 11; *Taylor v. Strayer*, 23, 31 (13).

1. *Highways.—Gravel Roads.—Boards of Commissioners.—Statutes.*—Where a petition for the construction of a gravel road is filed as provided for in the act of 1903 (Acts 1903, p. 255, §2) and the proper notice given as therein specified, the board of commissioners has jurisdiction thereof.

Todd v. Crail, 48, 52 (1).

2. *Inferior Courts.—Decision on.—Collateral Attack.*—Where the question of jurisdiction of an inferior tribunal depends upon facts which it must determine, its decisions thereon in favor of jurisdiction cannot be collaterally attacked.

Todd v. Crail, 48, 53 (2).

3. *Inferior Courts.—Pleadings.—Presumptions.*—Where the law requires certain facts to be embodied in the papers, pleadings or documents of a cause, and the proper inferior court proceeds with the case, the courts will presume, on a collateral attack, that such facts properly appeared.

Todd v. Crail, 48, 53 (3).

4. *Records.—Extrinsic Evidence.*—Where the face of the records of an inferior court do not affirmatively show jurisdiction, extrinsic evidence is admissible in aid thereof.

Todd v. Crail, 48, 54 (4).

5. *Regularity of Proceedings.—Presumptions.*—Where jurisdiction appears in a cause, the subsequent proceedings of the court will be presumed regular, unless the contrary affirmatively appears.

Todd v. Crail, 48, 55 (6).

6. *City Courts.—Appeal.—Superior Courts.*—The superior and circuit courts have no jurisdiction of a cause of action appealed from a city court, where such city court had none.

Steinmetz v. G. H. Hammond Co., 153, 156 (1).

7. *City Courts.—Justices of the Peace.—Statutes.*—City and justices' courts are of inferior and limited jurisdiction and possess only the powers expressly granted by statute or necessarily implied therefrom.

Steinmetz v. G. H. Hammond Co., 153, 156 (2).

8. *Waiver.—Consent.—Motions.*—Jurisdiction of the subject-matter cannot be waived either by silence or consent; and the want of jurisdiction may be questioned at any stage of a case; and where such want appears upon the face of the record, no formal motion is necessary to present the question.

Steinmetz v. G. H. Hammond Co., 153, 159 (7).

JURY—

Bribery, usually a question for, see **EVIDENCE**, 9; *Tinkle v. Wallace*, 382, 391 (10).

Misconduct of jurors, cause for new trial, see **NEW TRIAL**, 6; *Trombley v. State*, 231, 233 (4).

JURY—Continued.

Whether railroad company was guilty of negligence in placing hand-car on a farm crossing, question for, see **NEGLIGENCE**, 16; *Baltimore, etc., R. Co. v. Slaughter*, 330, 341 (11).

Contributory negligence in elderly lady's alighting from car, question for, see **INTERURBAN RAILROADS**, 1; *Indiana, etc., Traction Co. v. Jacobs*, 85, 89 (3).

Contributory negligence of woman alighting from moving train, question for, see **CARRIERS**, 4; *Wabash River Traction Co. v. Baker*, 262, 264 (1).

Assuming facts, in instructions, invasion of province of, see **TRIAL**, 27; *Beery v. Driver*, 127, 133 (6).

Negligence and contributory negligence are questions of fact for, see **TRIAL**, 49; *City of Indianapolis v. Keeley*, 516, 526 (14).

JUSTICES OF THE PEACE—

See **JURISDICTION**.

Have no equity jurisdiction, see **COURTS**, 12; *Steinmetz v. G. H. Hammond Co.*, 153, 157 (6).

LABOR—

Foreclosure of liens for, see **LIENS**, 1-3; *Little v. Friend*, 36.

LACHES—

See **EQUITY**.

LANDLORD AND TENANT—

Interest of tenant only, liable for laborer's lien, where tenant employed laborer, see **LIENS**, 2; *Little v. Friend*, 36, 41 (2).

LARCENY—

See **CRIMINAL LAW**; **EVIDENCE**.

Distinguished from embezzlement, see **EMBEZZLEMENT**, 1-4; *Vinnedge v. State*, 415.

Embezzlement.—Possession.—Where a servant has a mere naked possession or control of the money appropriated, and occupies no trust relation thereto, his appropriation of his employer's money constitutes larceny and not embezzlement.

Vinnedge v. State, 415, 420 (9).

LAST CLEAR CHANCE—

See **NEGLIGENCE**.

LATERAL SUPPORT—

See **REAL PROPERTY**.

LICENSE—

See **INTOXICATING LIQUORS**.

Of physician, may be revoked, see **CONSTITUTIONAL LAW**, 26; *Spurgeon v. Rhodes*, 1, 12 (10).

LIENS—

Special finding showing that defendant "assumed" payment of, see TRIAL, 54; *Ditchey v. Lee*, 267, 274 (6).

Payment of, may be assumed as part of purchase price, see VENDOR AND PURCHASER, 3; *Ditchey v. Lee*, 267, 273 (5).

1. *Laborers.—Foreclosure.—New Trial.—Evidence.—Sufficiency.*—Where the evidence shows that plaintiff was employed by the Matthews Drilling Company to assist in sinking a gas-and-oil well; that defendant Huffman told him to file a lien for his services; that he filed such lien against the land containing such well; that defendant Littler was the owner of the land, and that he had leased the gas-and-oil privileges to Walley, who had assigned same to the Consumers Gas Trust Company, a personal judgment against Littler and Huffman and a decree of foreclosure against Littler are not sustained by the evidence.
Littler v. Friend, 36, 38 (1).

2. *Laborers.—Foreclosure.—Leases.—Decree.*—A laborer, employed by the lessee of lands to explore for gas and oil, is entitled to a laborer's lien only as against such lessee's interest in such lands.
Littler v. Friend, 36, 41 (2).

3. *Contracts.—Express.—Implied.—Mechanics' and laborers'* liens rest upon contract, express or implied; and to support the same the evidence must show a contract with the owner of the interest against which the lien is sought to be enforced.
Littler v. Friend, 36, 41 (3).

LIFE TENANCIES—

Interests of tenants in fire policy on house, see INSURANCE, 7; *Glens Falls Ins. Co. v. Michael*, 659, 677 (7).

LIMITATION OF ACTIONS—

A judgment for defendant on a technically bad complaint will be affirmed, where the action is not barred by limitation, see APPEAL AND ERROR, 64; *Aiken v. City of Columbus*, 139, 152 (17).

Fraudulent concealment as affecting running of statute, see ACTION, 3; *Whitesell v. Strickler*, 602, 620 (25).

One year, in the absence of fraud, for suit to set aside widow's election to take under will, and six years to set aside election, fraudulently procured, not to take under will, see WILLS, 29, 30; *Whitesell v. Strickler*, 602, 618 (22), 619 (23).

Three years for will contest, see WILLS, 3; *Foley v. O'Donaghue*, 134, 137 (3).

Damages.—Lateral Support.—When Right of Action Accrues.—A right of action accrues for damages for withdrawal of lateral support, when plaintiff's land suffers the injury, and not when the support is removed. *Schmoe v. Cotton*, 364, 371 (14).

MALICE—

See MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION—

General verdict, effect of, see TRIAL, 45; *Farmers, etc., Fire Assn. v. Stewart*, 544, 547 (4).

Answer to interrogatory to jury that principal acted without malice, effect of, see TRIAL, 46; *Farmers, etc., Ins. Assn. v. Stewart*, 544, 547 (5).

MALICIOUS PROSECUTION—Continued.

1. *Corporations.—Liability for.—Principal and Agent.*—A private corporation is liable for a malicious prosecution instituted by its agent, where such prosecution was authorized or ratified by it, or was within the scope of such agent's authority.
Farmers, etc., Ins. Assn. v. Stewart, 544, 546 (2).
2. *Corporations.—Liability for Acts of Subagents.*—Where a subagent can be considered as the agent of a private corporation, either by reason of a permission given to appoint, or by the corporation's ratification of such subagent's acts, such corporation is liable for a malicious prosecution instituted by such subagent.
Farmers, etc., Ins. Assn. v. Stewart, 544, 547 (3).
3. *Want of Malice.*—Malice is an essential element in an action for malicious prosecution; and the want of probable cause without malice is insufficient to sustain an action therefor.
Farmers, etc., Ins. Assn. v. Stewart, 544, 547 (6).
4. *Principal and Agent.—Recovery against Agent Alone.*—Where an agent instituted a malicious prosecution against plaintiff, the plaintiff may recover against such agent although he fails to recover as against the principal.
Farmers, etc., Ins. Assn. v. Stewart, 544, 548 (7).

MANDAMUS—

Petition for, to compel placing of names on election ballots, see PLEADING, 42; *State, ex rel., v. Board, etc., 276, 287 (8).*

Tie Vote.—Special Election.—Mandamus lies to compel the proper municipal officers to order a special election, in case of a tie vote for councilmen. *State, ex rel., v. Ives, 13, 23 (14).*

MANSLAUGHTER—

See HOMICIDE.

MASTER AND SERVANT—

Complaint under factory act, see PLEADING, 43; *Bemis Indianapolis Bag Co. v. Krentler, 653, 658 (4).*

Negligence.—Factory Act.—Printing Presses.—A printing press is not one of the pieces of machinery specifically designated to be guarded under the provisions of the factory act (Acts 1899, p. 231, §9, §7087i Burns 1901).

Bemis Indianapolis Bag Co. v. Krentler, 653, 658 (3).

MAXIMS—

See WORDS AND PHRASES.

Volenti non fit injuria: No injury is done to a consenting person; see NEGLIGENCE, 7; *Indiana, etc., Traction Co. v. Jacobs, 85, 95 (14).*

Ut res magis valeat quam pereat: That the thing may prevail, rather than be destroyed; *Heaston v. Krieg, 101, 114.*

Sic utere tuo ut alienum non laedas: So use your own as not to injure another; see MUNICIPAL CORPORATIONS, 10; *Aiken v. City of Columbus, 139, 145 (7).*

Respondeat Superior: Let the principal be held responsible; *Cleveland, etc., R. Co. v. Hayes, 454, 460.*

Ignorance of Law.—Action.—The maxim "*ignorantia juris non excusat*" is perverted by an assumption that all persons know the law. *Millett v. City of Princeton, 582, 585 (4).*

MISTAKE—

In payee of a note, see **BILLS AND NOTES**, 1-6; *Digan v. Mandel*, 586.

MORTGAGES—

See **CONTRACTS**.

Any party claiming title may be made defendant in foreclosure suit, see **PARTIES**, 4; *City of Covington v. Ferguson*, 42, 46 (2).

Existence of, on maker's home, admissible on behalf of plaintiff in action against maker on note, where defense is payment, see **EVIDENCE**, 31; *Hasper v. Weitcamp*, 371, 375 (6).

Foreclosure.—Quieting Title.—A complaint for foreclosure of a mortgage alleging that defendant claims and asserts a reversionary interest without right in the mortgaged premises, and that if such defendant has any title thereto, it is inferior to the mortgage lien, and praying a sale "free from all claims of defendant," the answer thereto being a general denial, properly puts in issue defendant's title to such lands.

City of Covington v. Ferguson, 42, 45 (1).

MOTIONS—

See **PLEADING**, 44-49.

To quash, questions sufficiency of indictment, see **INDICTMENT AND INFORMATION**, 2, 3; *Padgett v. State*, 179, 181 (2), 182 (3).

In arrest does not lie where essentials are all charged, though imperfectly, see **INDICTMENT AND INFORMATION**, 2; *Padgett v. State*, 179, 181 (2).

To strike out evidence, when proper, see **EVIDENCE**, 8; *Tinkle v. Wallace*, 382, 390 (9).

To dismiss, as well as the ruling thereon and exception thereto, are a part of the record without a bill of exceptions, see **APPEAL AND ERROR**, 24; *Good v. Burk*, 462, 467 (8).

MUNICIPAL CORPORATIONS—

Rights of pedestrian on street, see **STREET RAILROADS**, 3-8; *Indianapolis Traction, etc., Co. v. Kidd*, 402.

Street railroad company's rights in use of street, see **STREET RAILROADS**, 3-8; *Indianapolis Traction, etc., Co. v. Kidd*, 402.

Election of councilman in case of tie vote, see **STATUTES**, 14-17; *State, ex rel., v. Ives*, 13.

Suit for enforcement of street-improvement lien, see **PLEADING**, 57; *Shirk v. Hupp*, 509, 510 (1).

Complaint for negligence in conduct of electric light plant, see **PLEADING**, 56; *Aiken v. City of Columbus*, 139, 150 (13).

Complaint for injuries from defective streets, see **PLEADING**, 52-55; *City of Indianapolis v. Keeley*, 516.

Actions on city orders, see **PLEADING**, 51; *City of Decatur v. McKean*, 249, 256 (6).

Complaint for services of special engineer for city, see **PLEADING**, 50; *City of Decatur v. McKean*, 249, 254 (2).

Officers of, may be mandated to order a special election in case of a tie vote for councilmen, see **MANDAMUS**; *State, ex rel., v. Ives*, 13, 23 (14).

MUNICIPAL CORPORATIONS—Continued.

Res ipsa loquitur, not applicable in cases of injuries from defective streets, see EVIDENCE, 32; *City of Indianapolis v. Keeley*, 516, 525 (11).

Election of councilmen, see ELECTIONS, 14, 15; *State, ex rel., v. Ives*, 13, 18 (6), 19 (7).

Right of egress and ingress is property right attaching to city lot, see EASEMENTS, 1; *MacGinnitie v. Silvers*, 321, 324 (3).

May contract orally or in writing, and by ordinance or resolution, see CONTRACTS, 11; *City of Decatur v. McKean*, 249, 255 (4).

Contract of employment of city engineer, see CONTRACTS, 8; *City of Decatur v. McKean*, 249, 254 (3).

Officers of, hold over under the Constitution, see CONSTITUTIONAL LAW, 22; *State, ex rel., v. Ives*, 13, 19 (8).

Boards of commissioners, in vacating streets and alleys in disannexed part of cities, act in judicial capacity, see BOARDS OF COMMISSIONERS; *MacGinnitie v. Silvers*, 321, 324 (4).

Burden of proving that plaintiff did not use care proportionate to the known danger in using a defective street, upon city, see TRIAL, 4; *City of Indianapolis v. Keeley*, 516, 523 (9).

1. *Waters. — Drains. — Statutes. — Construction.*—Section 3598 Burns 1901, Acts 1891, p. 304, §1, providing that cities may construct drains as inlets or outlets into or out of any parts of such cities, when construed liberally as is required by §3603 Burns 1901, Acts 1891, p. 304, §6, gives such cities power to divert a natural watercourse.

City of Huntington v. Amiss, 375, 378 (2).

2. *Drains.—Assessments.—Waters.*—A city has the power under the act of 1891 (Acts 1891, p. 304, §§3598-3606 Burns 1901) to assess the benefits and damages to property owners for the diversion of a natural watercourse changed for the purpose of the drainage of such city.

City of Huntington v. Amiss, 375, 379 (3).

3. *Drains. — Assessments. — Committee. — Members. — Qualifications.—Failure to Object.—Waiver.*—The failure of interested property owners to object to the members of a committee to make assessments for the drainage of a city under §3598 Burns 1901, Acts 1891, p. 304, §1, because of disqualification, before such committee made its report to the common council, is a waiver of their right to raise such objection.

City of Huntington v. Amiss, 375, 379 (5).

4. *Liability. — Schools. — Charities. — Police Power.*—Municipal corporations are not ordinarily liable for their conduct in reference to schools or charities, or in the exercise of the police power, such conduct being governmental and not local.

Aiken v. City of Columbus, 139, 141 (1).

5. *Purely Corporate Acts. — Liability.*—Municipal corporations are liable for negligence in the performance of purely corporate acts the same as an individual doing similar acts.

Aiken v. City of Columbus, 139, 142 (2).

6. *Streets.—Defects.—Liability.—Grounds of.*—The grounds of municipal liability for damages caused by defects in streets are the municipality's exclusive control over the streets and power of taxation for the repair thereof.

Aiken v. City of Columbus, 139, 143 (3).

MUNICIPAL CORPORATIONS—Continued.

7. *Streets.—Lighting.—Duty as to Statutes.*—Municipal corporations, under §4301 Burns 1901, Acts 1883, p. 85, §1, may light their streets, but are not required, either expressly or by implication, to do so. *Aiken v. City of Columbus*, 139, 144 (4).
8. *Liability.—Voluntary Exercise of Power.*—The fact that a municipal corporation voluntarily exercises certain powers, is a large factor in determining whether the municipality is liable for negligence in the performance of such powers.
Aiken v. City of Columbus, 139, 144 (5).
9. *Liability.—Voluntary Acts for Corporate Advantage.*—Municipal corporations are ordinarily liable for negligence in the performance of acts voluntarily done for their own advantage.
Aiken v. City of Columbus, 139, 144 (6).
10. *Proprietorship.—Liability.—Maxims.—Sic utere tuo ut alienum non laedas.*—Municipal corporations are liable, as other proprietors, for negligence in the care and control of their property voluntarily acquired for purposes partly or wholly corporate.
Aiken v. City of Columbus, 139, 145 (7).
11. *Streets.—Electric Lights.—Whether Governmental or Corporate Function.—Prevention of Damage Suits.*—While the lighting of streets incidentally checks crime and immorality and thus serves a governmental purpose, such lighting also becomes a corporate utility, sufficient to make municipal corporations liable for negligence therein, by the fact that it is of local convenience and prevents many damage suits brought because of injuries from defective streets, the derivation of an income therefrom being unnecessary to establish such liability.
Aiken v. City of Columbus, 139, 146 (8).
12. *Liability.—Proprietorship.—Governmental and Corporate Purposes.*—Where property is voluntarily held for benefits accruing to the municipality, or as a means of attaining such benefits, though it may also serve a governmental purpose, the municipality is liable for negligence in the control thereof.
Aiken v. City of Columbus, 139, 147 (9).
- 12a. *Streets.—Failure to Light.—Negligence.*—The failure of a municipal corporation to light its streets, unless required by statute to do so, does not constitute negligence.
Aiken v. City of Columbus, 139, 149 (10).
13. *Liability.—Electric Lights.*—A municipal corporation is liable *ex delicto* for negligence in the management of its electric light plant. *Aiken v. City of Columbus*, 139, 150 (11).
14. *Liability.—Immunity.—Public Policy.*—Public policy requires that the doctrine that municipal corporations are not liable for negligence in the performance of purely governmental matters, shall be kept strictly within its limits, official vigilance to prevent private wrongs being desirable.
Aiken v. City of Columbus, 139, 150 (12).
15. *Negligence.—Electric Lights.—Operation.*—Cities are liable for negligence in the operation of electric light plants used to furnish light for such cities and for commercial purposes.
Aiken v. City of Columbus, ante, 139, followed.
City of Richmond v. Lincoln, 468, 470 (1).
16. *Negligence.—Electric Lights.*—Cities are liable for negligence in the operation of their electric light plants, although such plants are controlled by boards of electric light commis-

MUNICIPAL CORPORATIONS—Continued.

sioners appointed by such cities' councils by virtue of §§3543a-3543g Burns 1901, Acts 1901, p. 423, such boards being amenable to, and removable at the will of, such councils (§3536 Burns 1901, §3101 R. S. 1881).

City of Richmond v. Lincoln, 468, 470 (2).

17. *Special Civil Engineers.—Power to Appoint.—Discretion.—Review of.*—The power to employ a special civil engineer is discretionary with a city council, an abuse of which discretion being subject to judicial review.

City of Decatur v. McKean, 249, 256 (5).

18. *Orders.—Execution.*—Under §3504 Burns 1901, §3069 R. S. 1881, the execution of a valid city order requires the signatures of the mayor and city clerk, and the failure of either to sign same renders it invalid.

City of Decatur v. McKean, 249, 257 (7).

19. *Treasurers.—Refusal to Pay.—Orders Not Signed by Mayor.*—It is the duty of a city treasurer to refuse to pay a city order not signed by the mayor or city clerk.

City of Decatur v. McKean, 249, 258 (8).

20. *Civil Engineers.—Employment.—Evidence.—Sufficiency.—Public Officers.*—Where a special committee of the city council was appointed to contract for the services of a civil engineer and they contracted with plaintiff, who was a county surveyor, at a certain compensation, which employment was reported orally to the council; and plaintiff performed the required services, the council paying the salary agreed upon, but not the additional per cent provided, the plaintiff is entitled to recover such additional per cent.

City of Decatur v. McKean, 249, 258 (9).

21. *Defective Streets.—Notice.—Choice of Ways.*—Where plaintiff received injuries by reason of a defective street, of which he had no notice, the fact that safe ways might have been taken by plaintiff is immaterial.

City of Indianapolis v. Keeley, 516, 523 (6).

22. *Streets.—Obstructions Near.*—Municipal corporations may be liable for negligence in placing within the margin of its streets objects calculated to frighten ordinarily gentle horses.

Baltimore, etc., R. Co. v. Slaughter, 330, 344 (17).

23. *Streets.—Rights of Users.—Street Railroads.*—All users of the public streets of a city have equal rights to the use of all parts thereof, subject to the condition that the use made shall not unnecessarily interfere with similar rights of others in such use.

Indianapolis Traction, etc., Co. v. Kidd, 402, 407 (3).

24. *Sidewalks.—Riding Bicycles on.—Criminal Law.*—Riding a bicycle on a city sidewalk composed of stone, brick, plank or gravel is, by §4398 Burns 1901, §3361 R. S. 1881, a misdemeanor.

Millett v. City of Princeton, 582, 584 (1).

25. *Ordinances.—State Laws.—Which Govern.*—An act punishable by a state law cannot be made punishable by a city ordinance.

Millett v. City of Princeton, 582, 584 (2).

26. *Ordinances.—Sidewalks.—Riding Bicycles on.—Knowledge of Law.*—Where a bicycle rider knew it was a violation of the state law to ride a bicycle on a certain sidewalk in a city, an ordinance granting him the right to ride on such sidewalk did not even give him a colorable right so to ride.

Millett v. City of Princeton, 582, 585 (5).

MUNICIPAL CORPORATIONS—Continued.

27. *Ordinances.—General Language.—Restraints on.*—A city ordinance permitting bicycle riding generally on its sidewalks will be held to apply only to those sidewalks upon which it is authorized by the State laws to permit bicycle riding.
Millett v. City of Princeton, 582, 585 (6).
28. *Ordinances.—Prohibiting Bicycle Riding on Certain Sidewalks.*—Where a city ordinance prohibits bicycle riding on the sidewalks of a certain territory, the presumption is that such territory contained sidewalks of the kind that the city might lawfully exercise jurisdiction over.
Millett v. City of Princeton, 582, 585 (7).
29. *Enforcement of Laws.—Liability for Failure.—Sidewalks.—Bicycles.*—A city is not liable for its failure to enforce the laws, or for an *intra vires* act done in its legislative capacity; and is therefore not liable to a pedestrian struck by a bicycle rider who is unlawfully using its sidewalk.
Millett v. City of Princeton, 582, 586 (8).
30. *Street Assessments.—Collection.—Council's Right to Prescribe Method.*—An order of the city council that street assessments shall be collected as taxes are collected, is surplusage, since §3623f Burns 1901, Acts 1901, p. 534, §6, specifically prescribes the method of collection. *Shirk v. Hupp*, 509, 511 (3).
31. *Street Assessments.—How Questioned.*—Under §3623d Burns 1901, Acts 1901, p. 534, §4, defects in street assessments can be remedied only by a direct appeal to the circuit court from the order fixing same.
Shirk v. Hupp, 509, 512 (4).
32. *Street Improvements.—Contracts.*—A general order for the improvement of a certain street in accordance with certain specifications is complied with when such street is made to conform to such specifications; and it is not necessary to change any part of such street that already conforms to such specifications.
Shirk v. Hupp, 509, 512 (5).
33. *Street Assessments.—How Fixed.—Statutes.*—Under §3623c Burns 1901, Acts 1901, p. 534, §3, street assessments are made on the theory of special benefits received; and it is not unlawful to assess the cost of improving the east side of a street to frontagers upon such side, if they alone received special benefits therefrom.
Shirk v. Hupp, 509, 513 (6).
34. *Street Assessments.—Collection of.—Attorneys' Fees.—Constitutional Law.*—Section 3623f Burns 1901, Acts 1901, p. 534, §6, providing for the recovery of attorneys' fees in cases of foreclosure of street improvement liens, is constitutional.
Shirk v. Hupp, 509, 514 (7).
35. *Street Improvements.—Contracts.—Notice.*—Where a city council adopted a resolution that it would receive bids for a street improvement "up to 6 o'clock, October 30," and ordered its clerk to publish notice of the letting "for three weeks before October 6," and the clerk published a notice for three successive weeks, that bids would be received up to "5 o'clock, October 30," the first of which was published on October 1, and the last, on October 22, such notice is a sufficient compliance with the statute (§3623a Burns 1901).
Shirk v. Hupp, 509, 514 (8).
36. *Street Assessments.—Contracts.—Waiver.*—A contract waiving irregularities in street assessments as provided by §4294 Burns 1894, Acts 1891, p. 323, §2, thus securing the privilege

MUNICIPAL CORPORATIONS—Continued.

of paying same by instalments, creates a personal liability against the party executing same, enforceable if any part of such assessment remains unpaid after foreclosure and sale of the assessed property. *Hayes v. Shirk*, 569, 578 (10).

37. *Street Assessments.—Decedents' Estates.—Real Property.—Executors and Administrators.*—Street assessments made against lots belonging to a decedent's estate constitute no liability against the decedent nor his estate, and his personal representatives have nothing to do with same.

Hayes v. Shirk, 569, 580 (17).

38. *Streets and Alleys.—Vacation of.—Remonstrance.—Appeal and Error.—Boards of Commissioners.*—The filing before the board of commissioners of an unverified remonstrance, by a landowner, against the vacation of the streets and alleys in a plat of land disannexed by a municipal corporation, in a proceeding under §4229 Burns 1901, Acts 1893, p. 44, providing for such vacation, sufficiently shows an interest in such remonstrant entitling him to appeal from the decision of such board.

MacGinnitie v. Silvers, 321, 323 (1).

39. *Streets and Alleys.—Vacation of.—Joint Remonstrance.—Appeal by One.—Boards of Commissioners.*—One of several joint remonstrants, in a proceeding to vacate the streets and alleys of a plat of land disannexed by a municipal corporation, has the right to a separate appeal from the decision therein by the board of commissioners.

MacGinnitie v. Silvers, 321, 323 (2).

NAMES—

Of injured person, or excuse for failure to give, must be stated in indictment, see INDICTMENT AND INFORMATION, 5; *Padgett v. State*, 179, 183 (5).

NEGLIGENCE—

See CARRIERS; DAMAGES; INTERURBAN RAILROADS; PLEADING; RAILROADS; STREET RAILROADS.

Liability for injury to gratuitous passenger, see STREET RAILROADS, 2; *Indianapolis Traction, etc., Co. v. Klentschy*, 598, 601 (4).

Placing hand-car on farm crossing, complaint for, see PLEADING, 64-67; *Baltimore, etc., R. Co. v. Slaughter*, 330.

Complaint for injuries from defective streets, see PLEADING, 52-55; *City of Indianapolis v. Keeley*, 516.

Failure of a city to light streets is not, see MUNICIPAL CORPORATIONS, 12a; *Aiken v. City of Columbus*, 139, 149 (10).

Not necessary to guard printing press, see MASTER AND SERVANT; *Bemis Indianapolis Bag Co. v. Krentler*, 653, 658 (3).

Damage to crops in barn admissible in case of defectively constructed windmill on barn, see EVIDENCE, 34; *Flint & Walling Mfg. Co. v. Beckett*, 491, 504 (19).

Plaintiff's want of due care must be proved by defendant, see EVIDENCE, 33; *City of Indianapolis v. Keeley*, 516, 526 (17).

In maintenance of private way gives right of action to one having right to use same, and injured thereby, see EASEMENTS, 2; *Baltimore, etc., R. Co. v. Slaughter*, 330, 337 (4), 338 (4).

NEGLIGENCE—Continued.

Negligence and contributory negligence, not factors in action for damages for loss of lateral support, see DAMAGES, 4; *Schmoe v. Cotton*, 364, 367 (3).

Wife may recover doctors' bills in cases of, where she becomes personally liable therefor, see DAMAGES, 2; *Indianapolis Traction, etc., Co. v. Kidd*, 402, 414 (18).

Liability for gratuitous carriage may be avoided by contract, see CARRIERS, 3; *Indianapolis Traction, etc., Co. v. Klentschy*, 598, 601 (5).

Instructions as to contributory, see TRIAL, 21-24.

Depriving adjoining proprietor of lateral support, see REAL PROPERTY; *Schmoe v. Cotton*, 364, 368 (4).

Burden of proving contributory, on defendant, see TRIAL, 4, 5, 48; *City of Indianapolis v. Keeley*, 516, 523 (9), 526 (15), 525 (13).

Meaning of word, see WORDS AND PHRASES, 3; *Lake Erie, etc., R. Co. v. Ford*, 205, 211 (6).

1. *Due Care*.—Where damage results to plaintiff by reason of defendant's failure to exercise due care in any situation, an action in tort for the recovery of such damage lies on behalf of plaintiff. *Flint & Walling Mfg. Co. v. Beckett*, 491, 499 (7).

2. *Erecting Windmill.—Dangerous Character.—Notice*.—Defendant company, which contracts to erect a windmill on plaintiff's barn, is liable for injuries caused by its failure to use ordinary care in fastening such windmill firmly, thus causing it to fall on plaintiff's barn to his damage, the defendant being chargeable with notice of the danger resulting from its negligence. *Flint & Walling Mfg. Co. v. Beckett*, 491, 500 (8).

3. *Erecting Windmill.—Duty of Plaintiff to Examine.—Contracts*.—Where plaintiff sustained damages because of defendant company's negligence in performing its contract safely and securely to erect a windmill on plaintiff's barn, plaintiff was under no duty, as to defendant, to inspect such windmill to determine its safety. *Flint & Walling Mfg. Co. v. Beckett*, 491, 501 (9).

4. *Proximate Cause.—Intervening Agent*.—Where the proximate result of defendant's negligence is damage to the plaintiff, the defendant is liable provided the line of causation is not broken by some intervening responsible agent. *Flint & Walling Mfg. Co. v. Beckett*, 491, 501 (10).

5. *Selling Dangerous Articles.—Liability.—Intervening Agent*.—One who knowingly sells an article intrinsically dangerous to person or property, concealing the fact of its dangerous character, is liable to any person, who, without the fault of himself or other person sufficient to break the line of causation, is injured thereby. *Flint & Walling Mfg. Co. v. Beckett*, 491, 501 (11).

6. *Contributory.—Erection of Windmill.—Failure to Inspect.—Contracts*.—The plaintiff is not guilty of contributory negligence for failing to inspect a windmill which defendant had contracted to erect in a safe and secure manner and which it had negligently erected to plaintiff's damage. *Flint & Walling Mfg. Co. v. Beckett*, 491, 502 (13).

NEGLIGENCE—Continued.

7. *Contributory.—Volenti non fit Injuria.*—A woman stepping from an interurban car at night, unable to distinguish plainly the defective place of alighting, and who exercises ordinary care therein, is not *volens* to such defective place.
Indiana, etc., Traction Co. v. Jacobs, 85, 95 (14).
8. *Standard of Care.*—The legal standard of ordinary care under the circumstances does not vary in negligence cases, though the circumstances to which such test is applied varies with each case; and the greater the danger in a particular case, the greater the diligence required by ordinary care.
Lake Erie, etc., R. Co. v. Ford, 205, 213 (8).
9. *Street Railroads.—Tracks.—Use of, by Pedestrians.*—In determining the questions of due care and contributory negligence of a pedestrian using a street car track as a footway, all of the circumstances are to be considered.
Indianapolis Traction, etc., Co. v. Kidd, 402, 408 (4).
10. *Proximate Cause.—Contributory Negligence.*—To deny a recovery of damages negligently caused, on the ground of contributory negligence, it must appear that such contributory negligence proximately, actively and contemporaneously contributed to such injury.
Indianapolis Traction, etc., Co. v. Kidd, 402, 410 (10).
11. *Street Railroads.—Person on Track.—Knowledge of.*—A street railroad company is chargeable with knowledge of a woman's presence on the track, where the motorman had an unobstructed vision of her for 1,000 feet.
Indianapolis Traction, etc., Co. v. Kidd, 402, 412 (13).
12. *Contributory.—Last Clear Chance.*—Where defendant knows or should know of plaintiff's negligence in time to avoid any injury therefrom, his failure so to avoid injury to the plaintiff becomes the proximate and efficient cause of such injury.
Indianapolis Traction, etc., Co., v. Kidd, 402, 411 (12).
13. *Bare Licensee.—Trespasser.—Safety of Premises.*—The owner is under no duty to keep his premises safe for a bare licensee or trespasser who enters such premises upon his own initiative and without any enticement, allurement or invitation of such owner.
Baltimore, etc., R. Co. v. Slaughter, 330, 334 (1).
14. *Licensee.—Invitation.—Safety of Premises.*—The owner of premises is under a duty to exercise care for the safety and protection of a licensee who enters such owner's premises by reason of an enticement, allurement or inducement, mere acquiescence in the entry thereof being insufficient to place the owner under such duty.
Baltimore, etc., R. Co. v. Slaughter, 330, 335 (3).
15. *Proximate Cause.—Pleading.*—It is not necessary that the proximate cause of an injury should be shown to be one that always or even ordinarily produces the alleged injury; but it is sufficient if it was reasonably to be apprehended that such injury might occur to one while exercising his legal rights.
Baltimore, etc., R. Co. v. Slaughter, 330, 340 (9).
16. *Placing Hand-Car in Railroad Crossing Way.—Question for Jury.*—Whether a railroad company was guilty of negligence in placing a hand-car in a farm crossing way is a mixed question of law and fact and a proper question for the jury.
Baltimore, etc., R. Co. v. Slaughter, 330, 341 (11).

NEGLIGENCE—Continued.

17. *Railroads.—Placing Hand-Car in Way.—Frightening High-Spirited Horses.*—A railroad company may be liable for injuries caused by the fright of plaintiff's high-spirited horses at a hand-car, negligently placed by it upon a farm crossing way and calculated to frighten ordinarily gentle horses.
Baltimore, etc., R. Co. v. Slaughter, 330, 342 (13).
18. *Contributory.—Defense.—Driving High-Spirited Horses.*—Courts cannot assume that plaintiff was guilty of contributory negligence in driving a high-spirited team, such question being a matter of defense (§359a Burns 1901, Acts 1899, p. 58).
Baltimore, etc., R. Co. v. Slaughter, 330, 342 (14).

NEGOTIABLE INSTRUMENTS—

See **BILLS AND NOTES.**

NEW TRIAL—

See **APPEAL AND ERROR.**

Motion for, not necessary in case of indirect contempt for refusal to be examined as a party, where sole question is whether the party fully answered the charge, see **CONTEMPT**; *McSwane v. Foreman*, 171, 175 (4).

The use of "findings" instead of "decision" in motion for, sufficient, see **APPEAL AND ERROR**, 72; *Ellison v. Ganiard*, 471, 481 (2).

Motion for, how made part of the record, see **APPEAL AND ERROR**, 69; *Wurfel v. State*, 160; *Wurfel v. State*, 191, 192 (2).

1. *Argument of Counsel.—Misconduct.—Affidavits.—Appeal and Error.*—The filing of affidavits in support of a motion for a new trial on the ground of misconduct of counsel in the argument to the jury may be useful in refreshing the trial judge's memory of the facts, but such affidavits cannot be considered on appeal, and the trial judge's striking them out constitutes no error.
Hasper v. Weitcamp, 371, 373 (2).
2. *Argument of Counsel.—Misconduct.—Objections.—How Raised.*—In order to present any question as to the misconduct of counsel in the argument to the jury it is necessary for the complaining party at the time of such misconduct to make a proper motion for the court to withdraw such offensive remarks from the consideration of the jury, or to set aside the submission of the cause, or to discharge the jury.
Hasper v. Weitcamp, 371, 374 (3).
3. *Causes for.—Joint Assignment.—Evidence.*—Where error is predicated, in a motion for a new trial, jointly on a number of rulings of the court on questions to a witness and answers thereto, such error is not well taken unless all of such rulings are bad.
Heaston v. Krieg, 101, 119 (27).
4. *Instructions.—Joint Assignment.*—Error jointly assigned as to a number of instructions in the motion for a new trial, is not availing unless all of such instructions are bad.
Heaston v. Krieg, 101, 120 (29).
5. *Misconduct of Juror.—Decision of Trial Court Thereon.—Appeal and Error.*—The trial court's decision whether a juror gave the prosecuting witness a sign of recognition by a movement of the hand and wink of the eye will not ordinarily be disturbed on appeal.
Trombley v. State, 231, 232 (8).

NEW TRIAL—Continued.

6. *Misconduct of Jurors.—Discovery of, before Verdict.—Waiver.*—Where defendant discovered the misconduct of a juror before the jury retired, and he made no complaint thereof until after verdict was rendered, such objection is waived.
Trombley v. State, 231, 233 (4).
7. *Misconduct of Jurors.—Prejudicial.*—Whether a juror motioned at defendant with his closed fist or was sporting with the deputy prosecuting attorney was a question of fact for the trial court; and such conduct, sporting with such attorney, though objectionable, is not reversible, where it is shown that such juror voted favorably to defendant for a long time, and yielded only when thoroughly convinced of defendant's guilt, no prejudice to defendant's rights being shown.
Trombley v. State, 231, 234 (5).
8. *Misconduct of Jurors.—Presumptions.—Evidence.—Absence of.*—Where the trial court found against defendant on his allegations of misconduct of jurors, no presumption of injury to defendant's rights arises; and in the absence of the evidence the Supreme Court will not disturb the verdict and judgment below.
Trombley v. State, 231, 236 (6).
9. *Evidence.—Railroads.—Setting Fires.*—Where the evidence, in an action against a railroad company for negligently setting fires, showed that an engine was drawing thirty-two cars, mostly loaded, up a grade of from forty to fifty feet per mile, and sparks of the size of a dime were thrown 100 feet and that a barn was set on fire, thereby setting on fire plaintiff's house and storeroom, negligence is sufficiently shown.
Cleveland, etc., R. Co. v. Hayes, 454, 460 (12).

NON EST FACTUM—

See PLEADING.

NOTICE—

See NEGLIGENCE.

Of powers of officers, all persons must take, see OFFICERS, 1;
Hord v. State, 622, 632 (2).

Not necessary to allege notice to carrier in cases of defective places of alighting, see PLEADING, 76; *Indiana, etc., Traction Co. v. Jacobs*, 85, 88 (2).

Of breach of condition in policy compels company to elect whether to avoid or continue, see INSURANCE, 15; *Glens Falls Ins. Co. v. Michael*, 659, 679 (15).

Possession.—Quieting Title.—The possession of lands up to a fence is notice, to a purchaser of adjoining lands, of title by such possessor.
Adams v. Betz, 161, 168 (5).

OFFICERS

See BOARDS OF COMMISSIONERS; ELECTIONS; EMBEZZLEMENT; MUNICIPAL CORPORATIONS; TOWNSHIP TRUSTEES.

Ordinary election, not to fill "vacancies," see STATUTES, 22; *State, ex rel., v. Ives*, 13, 21 (10).

Special election for councilman, in case of tie vote, see STATUTES, 14-17; *State, ex rel., v. Ives*, 13.

Of municipal corporation may be mandated to order special election in case of tie vote for councilmen, see MANDAMUS; *State, ex rel., v. Ives*, 13, 23 (14).

OFFICERS—Continued.

Election of councilmen, see ELECTIONS, 14, 15; *State, ex rel., v. Ives*, 13, 18 (6), 19 (7).

Holding over, see CONSTITUTIONAL LAW, 22, 23; *State, ex rel., v. Ives*, 13, 19 (8), 21 (9).

Bribery disqualifies from holding office, see CONSTITUTIONAL LAW, 12; *Tinkle v. Wallace*, 382, 389 (7).

1. *Public.—Dealings with.—Principal and Agent.—Notice.*—All persons dealing with a public officer are bound, at their peril, to take notice of the authority of such officer to bind his principal. *Hord v. State*, 622, 632 (2).

2. *Attorney-General.—Unauthorized Contracts.—Ratification.*—Contracts executed by the Attorney-General on behalf of the State, must be sanctioned by a statute, and if not, they are unauthorized and can be ratified only by the legislature. *Hord v. State*, 622, 632 (3).

3. *Attorney-General.—Assistant. — Compensation. — Statutes.*—Under §5670 R. S. 1881, Acts 1873, p. 18, §11, the Attorney-General had the legal right to employ assistants and to pay them for their services a sum not exceeding ten per cent of the amount of any moneys whatsoever collected by them for the State. *Hord v. State*, 622, 633 (4).

4. *Attorney-General.—Assistants.—Compensation. — Statutes.*—Under §§7692, 7693 Burns 1901, Acts 1889, p. 124, §§9, 10, the Attorney-General has the right to employ assistants and pay them not to exceed ten per cent of the money collected by them, except that due from the United States to the State because of direct taxes paid by such State during the civil war. *Hord v. State*, 622, 637 (5).

5. *Attorney-General.—Assistants.—Tenure of Service.*—Under §§7692, 7693 Burns 1901, Acts 1889, p. 124, §§9, 10, the Attorney-General has no authority to appoint assistants, for the collection of money due to the State, who shall serve for a longer time than during his official term. *Hord v. State*, 622, 638 (6).

6. *Deputies.—Tenure.*—In the absence of a statute, the tenure of office of a deputy or assistant is, subject to removal at any time, for the term of office of the principal; and where such principal is reelected, such deputies or assistants, to hold over, must be reappointed. *Hord v. State*, 622, 640 (7).

7. *Constitutional.—Auditor of State.—Duties.*—The Auditor of State is a constitutional officer whose duties must be prescribed by statute. *Sherrick v. State*, 345, 357 (9).

8. *Auditor of State.—Duties.—Notice.—Insurance Fees.—Principal and Agent.*—The statutes of the State are conclusive notice to all of the duties of the Auditor of State; and insurance companies paying fees to him under §8477 Burns 1901, Acts 1891, p. 199, §67, simply constitute him their agent to pay same to the State. *Sherrick v. State*, 345, 357 (10).

9. *Auditor of State.—Treasurer of State.—Duties.—Insurance.—Payments to Wrong Officer.*—Under §8477 Burns 1901, Acts 1891, p. 199, §67, regulating the business, transacted within this State, of foreign insurance companies, it is the duty of such companies to pay the prescribed fees to the Treasurer of State, a payment to the Auditor of State being a mere private unofficial transaction. *Sherrick v. State*, 345, 358 (11).

OFFICERS—Continued.

10. *Auditor of State.—Directing Collection of Money Due State.*—Section 7634 Burns 1901, §5611 R. S. 1881, requiring the Auditor of State to "direct and superintend the collection of all the moneys due the State" does not authorize him to collect on behalf of the State the insurance taxes due from foreign insurance companies. *Sherrick v. State*, 345, 359 (12).
11. *Auditor of State.—Receipt of Insurance Taxes.—Assumpsit.*—Payment of insurance taxes to the Auditor of State, under §8477 Burns 1901, Acts 1891, p. 199, §67, does not vest the title to such money in the State until a ratification is made, but such money may be recovered from such officer in an action for money had and received. *Sherrick v. State*, 345, 359 (14).
12. *Auditor of State.—Receipt of Insurance Taxes.—Ratification.*—An action upon the official bond of the Auditor of State for the recovery of insurance taxes received by him, brought subsequently to the alleged conversion, cannot make such prior conversion a crime when it was not one when committed. *Sherrick v. State*, 345, 360 (15).

OPINIONS—

See EVIDENCE, 19-23,

OVERRULED CASES—

See CASES.

OWNERSHIP—

How alleged, see PLEADING, 59; *Indianapolis St. R. Co v. Ray*, 236, 242 (10).

PARTIES—

See JURISDICTION; PLEADING.

On appeal, see APPEAL AND ERROR, 82-91.

Cannot, over objection, enter house of, for discovery, see TRESPASS, 1; *McSwane v. Foreman*, 171, 176 (6).

In action on replevin bond, see PLEADING, 60; *Jackson v. Morgan*, 528, 531 (1).

Examination of, before trial, see DISCOVERY.

Indirect contempt for refusal to be examined, see CONTEMPT; *McSwane v. Foreman*, 171, 175 (4).

As to names of, see APPEAL AND ERROR, 89, 90; *Good v. Burk*, 462.

Jurisdiction of, on appeal, see APPEAL AND ERROR, 65-68.

Examination of, as witnesses prior to the trial, see APPEAL AND ERROR, 48; *McSwane v. Foreman*, 171, 176 (5).

To a suit for reformation of a deed, see ACTION, 2; *Adams v. Betz*, 161, 168 (4).

Effect of death of, see ABATEMENT AND REVIVAL; *Hayes v. Shirk*, 569, 573 (2).

Discharged executor, not a proper party to will contest, see WILLS, 5; *Foley v. O'Donaghue*, 134, 138 (6).

1. *Real.—Nominal.—Bills and Notes.—Pleading.*—The real payee of a note may maintain an action on a note executed by mistake in the name of another by showing that he was the intended payee. *Digan v. Mandel*, 586, 594 (12).

PARTIES—Continued.

2. *Husband and Wife.—Industrial School for Girls.—Commitment.*—In a proceeding to commit an alleged incorrigible girl under fifteen years of age to the Industrial School for Girls (Acts 1903, p. 91), the husband of such girl is neither a proper nor a necessary party. *Ryan v. Rhodes*, 121, 124 (4).
3. *Interurban Railroads.—Subsidies.—Petitions.—Signatures.*—Petitioners for an interurban railroad subsidy election, though signing by surnames and initials only of Christian names, and by partnership names, are parties and have the right to take any steps deemed necessary in the conduct of the proceeding. *Good v. Burk*, 462, 466 (6).
4. *Mortgages.—Foreclosure.*—Under §269 Burns 1901, §268 R. S. 1881, any party claiming title adversely to plaintiff, or who is necessary to a complete determination of the question involved, may be made a defendant in a foreclosure suit. *City of Covington v. Ferguson*, 42, 46 (2).

PARTITION—

May be by parol, see QUIETING TITLE, 2; *Adams v. Betz*, 161 164 (3).

Parties may orally agree upon a boundary line, see EVIDENCE, 13; *Adams v. Betz*, 161, 171 (9).

Parol.—Boundaries.—Estoppel.—Limitation of Actions.—Adverse Possession.—A parol agreement, without fraud, fixing an unknown or disputed boundary line, acted upon by the parties, estops such parties or those claiming under them from afterwards disputing such line; and the possession held under such agreement need not be shown to be adverse for the period prescribed by the statute of limitations.

Adams v. Betz, 161, 169 (7).

PASSENGERS—

See CARRIERS.

PERJURY—

Form of indictment for, see INDICTMENT AND INFORMATION, 10; *State v. Dorsey*, 199, 204 (6).

PHYSICIANS AND SURGEONS—

License may be revoked for immorality, see INJUNCTION, 2-7; *Spurgeon v. Rhodes*, 1.

Declarations of patient to physician admissible in evidence, see EVIDENCE, 6; *Indiana, etc., Traction Co. v. Jacobs*, 85, 92 (6).

Legislature may prescribe qualifications of, see CONSTITUTIONAL LAW, 25; *Spurgeon v. Rhodes*, 1, 11 (9).

License.—Revocation.—State Board of Medical Registration and Examination.—Courts.—The grant of a license to a physician, or its revocation, by the State Board of Medical Registration and Examination, is not the exercise of judicial power.

Spurgeon v. Rhodes, 1, 12 (11).

PLEADING—

As to exceptions, see APPEAL AND ERROR, 51-53.

Attacking complaint for first time on appeal, see APPEAL AND ERROR, 92-94.

PLEADING—Continued.

Petitioners for an interurban railroad subsidy election are parties, though they signed by the surnames and initials only of the Christian names, see **PARTIES**, 3; *Good v. Burk*, 462, 466 (6).

Where contestee requires the contestant to make a will an exhibit to his complaint, contestee cannot afterwards contend that it is not an exhibit, see **APPEAL AND ERROR**, 50; *Heaston v. Krieg*, 101, 107 (1).

Supplemental complaint, the rulings thereon and exceptions taken, are parts of the record, without a bill of exceptions, see **APPEAL AND ERROR**, 25; *Schmoe v. Cotton*, 364, 368 (5).

Sustaining demurrer to paragraph of answer, harmless, where facts may be proved under another, see **APPEAL AND ERROR**, 2; *American Express Co. v. State*, 428.

Sustaining demurrer to answer, harmless, where cross-complaint contains some facts, see **TRIAL**, 9; *City of Covington v. Ferguson*, 42, 47 (5).

All defenses provable under general denial, in quiet-title cases, see **QUIETING TITLE**, 1; *City of Covington v. Ferguson*, 42, 47 (3).

Plaintiff must recover according to his allegations, see **TRIAL**, 51; *Digan v. Mandel*, 586, 591 (5).

1. *Complaint.—Bills and Notes.—Ownership.*—Where the plaintiff is not the payee of a note, he must set out in his complaint thereon, facts showing that he holds the title thereto.

Digan v. Mandel, 586, 590 (1).

2. *Complaint.—Bills and Notes.—Mistake in Name of Payee.*—A complaint showing that the maker of a note, through mistake and inadvertence, inserted in the note as payee the name of a bank instead of the plaintiff, to whom the note was executed, sufficiently shows plaintiff's title to such note.

Digan v. Mandel, 586, 590 (2).

3. *Decedents' Estates.—Bills and Notes.—Execution.—Assignments.—Burden of Proof.*—Under §2479 Burns 1901, Acts 1883, p. 151, §11, an answer of *non est factum* is not necessary, on behalf of an executor or administrator, to require the owner of a note executed by decedent, to establish the execution thereof, a general denial compelling such owner to make such proof.

Digan v. Mandel, 586, 594 (11).

4. *Complaint.—Exhibits.—Variation.*—Where the contract set out as an exhibit varies from the contract as alleged in the body of the complaint, the exhibit controls.

Huber Mfg. Co. v. Wagner, 98, 100 (3).

5. *Complaint.—Contracts.—Sales.—Real Estate.—Description.—Two Tracts Answering.—Defense.*—A complaint for damages for the breach of a contract for the sale of "120 acres, owned by" defendant in certain sections, does not need to allege that defendant had no other land of like area in such sections, such fact being a proper defense.

Howard v. Adkins, 184, 190 (6).

6. *Complaint.—Damages.—Liquidated.—Whether Actual Must Be Alleged.*—Where the contract sued upon provides for liquidated damages, actual damages need not be alleged.

Howard v. Adkins, 184, 191 (13).

PLEADING—Continued.

7. *Answer.—Conclusiveness of.—Contempt.—Indirect.*—Defendant's answer in a proceeding for an indirect contempt imports absolute verity, and must be so considered by the court.
McSwane v. Foreman, 171, 177 (7).
8. *Plea in Abatement.—Insufficient.—Demurrer.—Defective.*—A bad demurrer is good enough for a bad plea in abatement.
Spaulding v. Mott, 58, 67 (8).
9. *Argumentative Denial.—Sustaining Demurrer to.—Appeal and Error.*—Sustaining a demurrer to argumentative denial, is harmless error where the general denial was pleaded.
American Express Co. v. Southern Ind. Express Co., 292, 314 (11).
10. *Answer.—Facts Provable Under Another Paragraph.—Demurrer.*—It is harmless error to sustain a demurrer to a paragraph of answer whose facts are provable under another.
American Express Co. v. State, 319, 320 (1).
11. *Answers.—Demurrers.—Subsequent Withdrawal.*—The subsequent withdrawal of a paragraph of answer will not render erroneous a ruling on demurrer to another paragraph of answer, where such ruling was not erroneous when made.
City of Covington v. Ferguson, 42, 47 (4).
12. *Insufficient Answer.—Reply.—Demurrer.—Carrying Back.*—A demurrer to a reply will be carried back and sustained to an insufficient answer.
Glens Falls Ins. Co v. Michael, 659, 680 (18).
13. *Demurrer.—Joinder of Parties in.*—Parties may join in a single demurrer, whether the demurrer be joint or several.
Whitesell v. Strickler, 602, 607 (2).
14. *Demurrer.—Defective.—Overruling.—Appeal and Error.*—Reversible error cannot be predicated upon the overruling of a defective demurrer.
City of Huntington v. Amiss, 375, 381 (6).
15. *Demurrer.—Defective.—Sustaining to Bad Answer.—Appeal and Error.*—Sustaining a defective demurrer to a bad pleading does not constitute reversible error.
City of Huntington v. Amiss, 375, 381 (7).
16. *Complaint.—Amendments.—Refusal to permit an amendment of the complaint during trial is largely discretionary with the trial court.*
Todd v. Crail, 48, 57 (9).
17. *Complaint.—Inferences to Supply Facts.*—Necessary facts in complaint cannot be supplied by intendment or by inference.
Chicago, etc., R. Co. v. McCandish, 648, 653 (4).
18. *Complaint.—Specific Averments.—Necessary Implications.*—Facts necessarily implied from the specific averments of a complaint are sufficiently alleged.
Indianapolis St. R. Co. v. Ray, 236, 241 (7).
19. *Supplemental Complaint.—Right to File.—Discretion of Court.*—The right to permit the filing of a supplemental complaint lies in the sound discretion of the court.
Schmoe v. Cotton, 364, 368 (6).
20. *Supplemental Complaint.—Ground for Filing.*—Permission should be given for filing a supplemental complaint where it will avoid the bringing of another action.
Schmoe v. Cotton, 364, 369 (7).

PLEADING—Continued.

21. *Complaint.—Names of Parties.—Judgment.—Orders made* by a board of commissioners in accordance with the prayer of a petition are not void because some of the petitioners signed same by their surnames and initials only of the Christian names, and others by their partnership names alone.
Good v. Burk, 462, 465 (2).
22. *Complaint.—Names of Parties.—*The defendant has the right to request that plaintiffs' full names shall be set out in the pleadings in the cause.
Good v. Burk, 462, 466 (4).
23. *Complaint.—Negligence.—Erection of Windmill.—*A complaint showing that defendant negligently failed securely to fasten the windmill, which defendant had contracted to erect, to the tower of plaintiff's barn, thereby causing damage to plaintiff, need not show that the supports to such mill were defective. *Flint & Walling Mfg. Co. v. Beckett*, 491, 502 (12).
24. *Complaint.—Torts.—Contracts.—Consideration.—Inducement.—*While the averment of the consideration of a contract in a complaint for misfeasance or malfeasance is an uncontrolling mark of an action *ex contractu*, still, if the contract is set out merely as a matter of inducement, the complaint may be regarded as in tort for the violation of a common-law duty.
Flint & Walling Mfg. Co. v. Beckett, 491, 502 (14).
25. *Code.—Complaint.—Facts.—Torts.—Contracts.—*Under code pleading the plaintiff in a case of tort may properly set out the contract with defendant as constituting the underlying facts from which the violated duty springs, instead of alleging the undertaking in general terms.
Flint & Walling Mfg. Co. v. Beckett, 491, 503 (15).
26. *Complaint.—Torts.—Contracts.—Negligence.—*A complaint setting out a contract by defendant with plaintiff for the erection of a windmill upon plaintiff's barn, together with a supplemental agreement concerning same, and then, after making many different allegations of negligence, avers that by reason of such acts of negligence, without any fault upon his part, the plaintiff sustained damage, states a cause of action in tort, and not on contract.
Flint & Walling Mfg. Co. v. Beckett, 491, 503 (16).
27. *Complaint.—General Construction.—*Pleadings will be construed so as to give effect, if possible, to all of the material allegations. *Flint & Walling Mfg. Co. v. Beckett*, 491, 504 (17).
28. *Complaint.—Construction by Trial Court.—Appeal and Error.—*A complaint whose allegations are such that it is doubtful whether it sounds in tort or in contract and which is tried upon the theory of an *ex delicto* action, will be so construed on appeal.
Flint & Walling Mfg. Co. v. Beckett, 491, 504 (18).
29. *Complaint.—Paragraphs of.—When not Considered.—Interrogatories to Jury.—*Where the answers to the interrogatories to the jury affirmatively show that the case was decided on the first paragraph of the complaint the other paragraphs will not be considered on appeal.
City of Indianapolis v. Keeley, 516, 522 (5).
30. *Demurrers.—Exceptions.—How Construed.—*Exceptions, apparently joint, will be construed in connection with the pleadings or motions upon which they are based, and if such pleadings or motions are several, such exceptions will be considered several.
Whitesell v. Strickler, 602, 608 (3).

PLEADING—Continued.

31. *Exceptions.—Presumptions.*—The presumption is that exceptions taken by a party on the trial were intended to be effectual in presenting the same questions on appeal.
Whitesell v. Strickler, 602, 609 (7).
32. *Answer.—Execution of Contract.—Fraud.*—An answer showing that defendant signed the contract sued upon, and that his signature was obtained by plaintiff's agent, without defendant's negligence and by means of a trick, the defendant thinking that he was executing a different contract, is sufficient as to a complaint for the enforcement of such contract.
Price v. Huddleston, 536, 541 (7).
33. *Obstruction to Highway.—Character of.*—It is not necessary either to allege or prove that an obstruction to a street or highway was calculated to frighten horses, such question being for the jury, to be determined from all the facts and circumstances.
Baltimore, etc., R. Co. v. Slaughter, 330, 341 (12).
34. *Reply.—Judgment.—Res Judicata.—Essentials.*—A reply of former adjudication must show (1) that the former judgment was rendered by a court having jurisdiction, (2) that the matter in issue in the present suit was or might have been adjudicated in such former suit, (3) that the parties to the issue were the same, and (4) that the judgment rendered was on the merits.
Johnson v. Knudson-Mercer Co. 429, 431 (1).
35. *Reply.—Sufficiency.—Judgment.—Res Judicata.—Parties.—Identity.*—To an answer of want of consideration of the note sued upon, a reply showing that the present defendant was "one of the defendants" in a former suit; that an issue in such suit involved the question whether such note was founded upon a sufficient consideration; that such issue was decided in favor of the present plaintiff, sufficiently shows that the parties were the same.
Johnson v. Knudson-Mercer Co., 429, 432 (2).
36. *Reply.—Res Judicata.—Parties.—Bills and Notes.—Consideration.—Principal and Surety.*—A reply of former adjudication, against the principal and surety on a note, showing that the question of the consideration of the note sued upon had been in issue between the present plaintiff and the principal on said note and decided in favor of the present plaintiff, is good as against such principal and his surety, where the reply shows that such other defendant was a surety.
Johnson v. Knudson-Mercer Co., 429, 433 (5).
37. *Reply.—Former Adjudication.—Subject-Matter.—Identity.*—To an answer of want of consideration of the note sued upon, a reply that such issue was litigated and determined in plaintiff's favor, on the merits, in a prior suit, sufficiently identifies the subject-matter of the former suit.
Johnson v. Knudson-Mercer Co., 429, 433 (6).
38. *Reply.—Former Adjudication.—Record of Former Suit.*—A reply of former adjudication does not need to set out a copy of the record of the former suit.
Johnson v. Knudson-Mercer Co., 429, 434 (7).
39. *Complaint.—Damages.—Lateral Support.*—A complaint alleging that defendant owned lands contiguous to those of plaintiff; that defendant excavated his land up to the line between their lands, and that because thereof plaintiff's lands fell in, causing her damage, is sufficient.
Schmoe v. Cotton, 364, 366 (2).

PLEADING—Continued.

40. *Supplemental Complaint.—Lateral Support.—Continuance of Wrong After Action Filed.*—Where defendant continued to remove plaintiff's lateral support after action brought, the granting of plaintiff's request for permission to file a supplemental complaint therefor, is not error.
Schmoe v. Cotton, 364, 369 (8).
41. *Answer.—Insurance Policies.—Avoidance.—Election.*—An answer in avoidance of an insurance policy, because of a condition broken, must set out such condition, a breach thereof by assured and the acts done by the insurer in pursuance of its election to avoid such policy.
Glens Falls Ins. Co. v. Michael, 659, 679 (16).
42. *Mandamus.—Election Commissioners.—Ballots.—Certificates of Nominations.*—A petition for mandate against the county board of election commissioners to compel them to place the names of certain nominees on the official ballots, as those of a certain party, must allege that the nomination certificates filed therefor show that the nominating convention designated the title of the party and the figure or device to be placed upon the ballot, as provided by §6215 Burns 1901, Acts 1889, p. 157, §18.
State, ex rel., v. Board, etc., 276, 287 (8).
43. *Complaint.—Master and Servant.—Factory Act.*—A complaint counting on defendant's violation of the factory act (Acts 1899, p. 231, §9, §7087i Burns 1901) must show that the machine causing the injury was of the class required by such act to be guarded, and that it was possible or practicable to guard such machine.
Bemis Indianapolis Bag Co. v. Krentler, 653, 658 (4).
44. *Motion in Arrest.—Motion to Modify Judgment.—Special Findings.*—Where the special findings set out the facts alleged in the cross-complaint and fully sustain the judgment rendered, the decision thereon disposes of the questions raised by motions in arrest and for modification of the judgment.
Ditchey v. Lee, 267, 276 (12).
45. *Motion to Make Specific.*—Where doubt exists as to the theory of plaintiff's complaint, a motion to make more specific is the proper remedy.
Shirk v. Hupp, 509, 511 (2).
46. *Negligence.—Motion to Make More Specific.*—A motion to make more specific and not a demurrer is the proper remedy where a complaint makes a general allegation of defendant's negligence and resulting injury to plaintiff.
Baltimore, etc., R. Co. v. Slaughter, 330, 340 (8).
47. *Complaint.—Motion to Make Specific.—Waiver.*—Where defendant fails to move to make the complaint more specific, defects in the averments thereof are waived.
Indianapolis St. R. Co. v. Ray, 236, 243 (14).
48. *Motions.—Venire de Novo.*—A motion for a *venire de novo* cannot be sustained unless the verdict, general or special, is so defective that the court cannot understand it.
Spaulding v. Mott, 58, 72 (16).
49. *Motions.—Venire de Novo.—Interrogatories to Jury.*—On a motion for a *venire de novo* a party cannot raise any question on the interrogatories to the jury, where such motion applied to the general verdict alone.
Spaulding v. Mott, 58, 72 (17).

PLEADING—Continued.

50. *Complaint.—Municipal Corporations.—City Engineers.—Special Engineers.—Defense.*—A complaint showing that defendant city employed the plaintiff as a special civil engineer for one year at a certain compensation is not bad as showing an attempt by the city to employ an engineer to do the duties of the city engineer, as provided by §3476 Burns 1901, providing for the appointment of a city engineer, the facts of such attempt, if available, being a defense to be specially answered.
City of Decatur v. McKean, 249, 254 (2).
51. *Complaint.—Municipal Orders.—Actions Upon.*—A complaint counting on a city order properly signed by the mayor and attested by the city treasurer states a good cause of action.
City of Decatur v. McKean, 249, 256 (6).
52. *Complaint.—Municipal Corporations.—Streets.—How Alleged.*—A complaint showing that within the limits of defendant city there existed certain streets, among which was Martindale avenue, sufficiently shows that such avenue was a street within such city.
City of Indianapolis v. Keeley, 516, 521 (1).
53. *Complaint.—Facts.—Duty Arising.—Municipal Corporations.—Streets.—Negligence.*—A complaint showing that plaintiff's injury was received because of a defect existing in a street in defendant city, is sufficient without any allegations showing defendant's duty with reference to such defect, such duty being a legal inference necessarily deducible from the facts, without any allegation thereof.
City of Indianapolis v. Keeley, 516, 521 (2).
54. *Complaint.—Municipal Corporations.—Streets.—Defects.—Notice.—Contributory Negligence.*—A complaint against a city for negligence in maintaining a defective street, showing that plaintiff had no notice of the defect, that the accident happened in the dark and that plaintiff was without fault or negligence on his part, does not show contributory negligence.
City of Indianapolis v. Keeley, 516, 521 (3).
55. *Complaint.—Negligence.—Contributory.—Allegation of Freedom from.*—An allegation in a complaint for damages for negligence, that plaintiff was without fault, is sufficient to negative negligence on plaintiff's part unless the other facts pleaded affirmatively show contributory negligence.
City of Indianapolis v. Keeley, 516, 521 (4).
56. *Complaint.—Municipal Corporations.—Negligence.—Proximate Cause.*—A complaint alleging that defendant city negligently suffered one of its electric light wires to become weak and rotten, and that the fall of such wire caused plaintiff's injuries, is bad, since it fails to show that such wire fell because of its weak and rotten condition.
Aiken v. City of Columbus, 139, 150 (13).
57. *Complaint.—Theory.—Municipal Corporations.—Street Assessments.—Bonds.*—Whether a suit to enforce the lien of a contractor for a street improvement is based upon the assessment made therefor or upon the bonds issued in payment thereof, as provided by §3623f Burns 1901, Acts 1901, p. 534, §6, is immaterial, such bonds being simply an evidence of such indebtedness.
Shirk v. Hupp, 509, 510 (1).
58. *Complaint.—Negligence.—Riding Bicycle on Sidewalk.—Ordinances.—Presumptions.*—An allegation that a bicycle rider was riding on a sidewalk pursuant to an ordinance means that

PLEADING—Continued.

- he was riding agreeably to such ordinance, and consequently that, in fact, he knew the provisions thereof.
Millett v. City of Princeton, 582, 584 (3).
59. *Ownership.—How Alleged.*—An allegation that plaintiff is the owner of the property in question is sufficient without alleging how the ownership was acquired.
Indianapolis St. R. Co. v. Ray, 236, 242 (10).
60. *Complaint.—Replevin Bonds.*—The plaintiff in an action in replevin, for which action a third party alone executed the required bond, is not a proper defendant in an action on such bond for damages.
Jackson v. Morgan, 528, 531 (1).
61. *Answer.—Evidence Admissible under.—Replevin.*—Under an answer in denial, in a replevin case, the defendant may give in evidence any facts tending to defeat plaintiff's claim to title, or right of possession.
Jackson v. Morgan, 528, 533 (4).
62. *Replevin.—Issue.*—A general denial to plaintiff's complaint in replevin raises an issue as to plaintiff's right of possession to the property, its value, and his damages for its detention.
Jackson v. Morgan, 528, 533 (6).
63. *Answer.—Sales.—Delivery of Worthless Goods.*—An answer showing that the plaintiff delivered goods, contracted for to be of a certain quality, which were at the time of shipment and have been at all times since "of no value, and wholly worthless, and for that reason the defendant refuses to accept the same," is sufficient as against a complaint for the contract price of such goods. *LaFayette Agricultural Works v. Phillips*, 47 Ind. 259, distinguished.
Price v. Huddleston, 536, 540 (5).
64. *Complaint.—Farm Crossings.—Invitation.*—A complaint showing that defendant railroad company built approaches to its track apparently for a farm crossing and planked between its tracks, coupled with the fact that the farmer owning lands on both sides thereof, and his tenants, have been using such crossing, sufficiently shows an invitation for such farmer and his tenants to use same.
Baltimore, etc., R. Co. v. Slaughter, 330, 335 (2).
65. *Complaint.—Railroads.—Farm Crossings.—Negligence.*—A complaint by the tenant of a landlord owning lands on each side of a railroad right of way, showing that the railroad company had built a private wagon road crossing over its tracks and had planked between the rails; that plaintiff had used such wagon road since its construction and that defendant negligently placed a hand-car in such road near such crossing, at which plaintiff's team became frightened, causing it to run away and to injure plaintiff, states a cause of action.
Baltimore, etc., R. Co. v. Slaughter, 330, 338 (6).
66. *Complaint.—Railroads.—Hand-Cars.—Placing in Private Way.—Frightening Horses.—Ordinary Gentleness.*—A complaint showing that defendant railroad company carelessly and negligently placed its hand-car lengthwise upon plaintiff's farm crossing and carelessly and negligently obstructed the free use of same, and that plaintiff was injured as a direct result thereof by his team's fright thereat, is sufficient, on demurrer, without a direct allegation that his team was ordinarily gentle.
Baltimore, etc., R. Co. v. Slaughter, 330, 339 (7), 342 (7).
67. *Complaint.—Railroads.—Negligence.—Proximate Cause.—Frightening Horses.*—A complaint showing that a railroad

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company's negligence in the placing of a hand-car in a way was so far an efficient cause of the running away of plaintiff's team, that, but for such negligence, it would not so have run, is sufficient on demurrer.

Baltimore, etc., R. Co. v. Slaughter, 330, 342 (15).

68. *Complaint.—Negligence.—Railroads.—Highway Crossings.—Travelers.*—In an action by an administrator against a railroad company for negligently killing his decedent at a highway crossing, the complaint must show the facts disclosing a legal duty owing by such company and a negligent performance or failure to perform such duty.

Chicago, etc., R. Co. v. McCandish, 648, 651 (1).

69. *Complaint.—Railroads.—Highway Crossings.—Travelers.—Characterizing Persons as.*—A complaint showing that the decedent "was on the east side of said railroad on the public highway * * * and was approaching the main line of the said defendant company * * * and he, * * * to avoid injury from said engine and train of cars, stopped, and was standing on the side-track, awaiting the passage of said engine and train," fails to show that such decedent was a traveler at and on such highway crossing when injured.

Chicago, etc., R. Co. v. McCandish, 648, 652 (3).

70. *Complaint.—Defective Premises.—Right of Injured Person to Occupy.*—In a complaint for an injury because of defective premises, it is necessary to allege by what right the injured person occupied such premises.

Chicago, etc., R. Co. v. McCandish, 648, 653 (5).

71. *Complaint.—Negligence.—Duty.—How Shown.*—A complaint for damages for negligence should set out the facts showing the true relationship of the parties from which the duty to use care arises.

Chicago, etc., R. Co. v. McCandish, 648, 653 (6).

72. *Complaint.—Negligence.—Railroads.—Setting Fires.—Excuses.*—A complaint alleging generally that defendant railroad company negligently (1) omitted to use a safe spark-arrester; (2) used a spark-arrester with unusually large and dangerous holes therein; (3) operated its locomotive with the trap door down, thereby increasing the draft, and (4) operated its locomotive with a high and dangerous pressure of steam, thereby setting fires and causing plaintiff's injuries, is sufficient as against a demurrer without an allegation that the defects in the spark-arrester could not be more explicitly set out because the locomotive was kept in defendant's exclusive possession.

Lake Erie, etc., R. Co. v. Ford, 205, 208 (1).

73. *Complaint.—Negligence.—Railroads.—Setting Fires.—Defective Spark-Arrester.—Plaintiff's Ignorance of.—Inferences.—Evidence.*—An allegation in the complaint that because defendant has kept the exclusive possession of its engine the plaintiff is unable to set out the defective condition of the spark-arrester, does not cause an inference that plaintiff cannot prove the defective condition thereof, since such condition may be proved by the escape of large and dangerous coals through such arrester.

Lake Erie, etc., R. Co. v. Ford, 205, 208 (2).

74. *Complaint.—Negligence.—Railroads.—Defective Spark-Arrester.—Notice.*—In an action against a railroad company for negligently setting fires it is not necessary to allege that

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- the defendant had notice of the defects in the spark-arrester causing the fire. *Lake Erie, etc., R. Co. v. Ford*, 205, 208 (3).
75. *Complaint.—Negligence.—Interurban Railroads.—Carriers.*—A complaint showing that defendant interurban railroad company negligently failed to provide a platform in the street on which passengers could alight, negligently failed to stop its car at the usual place, and negligently carried plaintiff beyond the usual stopping place and caused her to get off unassisted, in the dark where the ground was very uneven, by reason of which, in alighting, she fell and injured herself, is sufficient, though negligence in the failure to provide a platform in the street and in running the car beyond the usual place is not shown. *Indiana, etc., Traction Co. v. Jacobs*, 85, 88 (1).
76. *Carriers.—Interurban Railroads.—Defective Place for Alighting.—Notice.*—A complaint by a passenger against an interurban railroad company for injuries received in alighting at a defective place need not allege notice of such defect on the part of such company. *Indiana, etc., Traction Co. v. Jacobs*, 85, 88 (2).
77. *Negligence.—Special Damages.—Aggravation of Existing Condition.*—The aggravation of an existing condition is not considered as special damages; and evidence thereof is admissible under a comprehensive allegation of general damages. *Indiana, etc., Traction Co. v. Jacobs*, 85, 91 (4).
78. *Complaint.—Carriers.—Sufficiency of Averments of.—Street Railroads.*—A complaint alleging that defendant is a corporation organized under the laws providing for the formation of street railway companies and that it is the owner and engaged in operating a line from Union Station to Fairview Park, sufficiently shows that defendant is a carrier of passengers. *Indianapolis St. R. Co. v. Ray*, 236, 240 (3).
79. *Complaint.—Street Railroads.—Ownership of Car Causing Injuries.—Averments of.*—An allegation, in an action against a street railroad company for personal injuries, that "one of the cars of defendant's road, running south from Fairview Park to the city of Indianapolis" caused plaintiff's injuries, sufficiently shows that defendant was operating such car, the ownership of such car being an immaterial matter. *Indianapolis St. R. Co. v. Ray*, 236, 240 (5).
80. *Complaint.—Street Railroads.—Passenger Car.—Averments of.*—A complaint showing that plaintiff sounded the electric bell to be sounded by passengers desiring to get off; that the motorman stopped the car; that said car was a summer car having the seats running transversely; that passengers alighted at the side by stepping upon a running-board and thence to the ground, sufficiently shows that the car was a "passenger" car. *Indianapolis St. R. Co. v. Ray*, 236, 241 (6).
81. *Complaint.—Street Railroads.—Control of Cars.—Averments of.—Sufficiency of, after Verdict.*—A complaint alleging that plaintiff was, when injured, riding on "one of the cars of defendant's road" sufficiently shows, after verdict, that defendant was operating such car. *Indianapolis St. R. Co. v. Ray*, 236, 241 (8).
82. *Complaint.—Carriers.—Street Railroads.—Passengers.—Averments of.*—A complaint alleging that plaintiff was a passenger on defendant's car sufficiently shows the relation of

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passenger and carrier without an allegation that the fare was paid or offered or that plaintiff had a pass, or was on the car by contract, invitation or consent, such matters being proper matters of proof.

Indianapolis St. R. Co. v. Ray, 236, 242 (9).

83. *Complaint.—Carriers.—Passengers.—Duty.*—A complaint showing that plaintiff was a passenger on defendant's street railroad shows that defendant was under a legal duty to plaintiff.

Indianapolis St. R. Co. v. Ray, 236, 242 (11).

84. *Complaint.—Street Railroads.—Agents.—Liability for Acts of.*—A complaint showing that plaintiff, a passenger, was injured "on one of the cars of the defendant's road" shows a liability on the part of defendant street railroad company, such company being responsible for the negligent act of its agents.

Indianapolis St. R. Co. v. Ray, 236, 243 (12).

85. *Complaint.—Street Railroads.—Agents.—Negligence.—Proximate Cause.*—Allegations, in an action against a street railroad company for damages for personal injuries, that plaintiff rang the bell to stop, that the motorman stopped the car, and that while plaintiff was alighting the motorman negligently started the car, thereby injuring plaintiff, sufficiently shows that the motorman was acting in the scope of his employment and that his negligence was the proximate cause of the injuries.

Indianapolis St. R. Co. v. Ray, 236, 243 (13).

86. *Complaint.—Exhibits.—Wills.—Probate.—Contest.—Substitution of Another.*—A subsequent will is a proper exhibit to a complaint to set aside and annul the probate of a prior will, where the plaintiff asks also that such subsequent will be admitted to probate.

Heaston v. Krieg, 101, 107 (2).

87. *Complaint.—Exhibits.—Wills.—Probate.*—Under §365 Burns 1901, §362 R. S. 1881, providing that where an action is founded upon a written instrument, such instrument or a copy thereof must be filed with the complaint, a will sought to be probated must be set out in the complaint or made an exhibit thereto.

Heaston v. Krieg, 101, 108 (4).

88. *Complaint.—Exhibits.—Wills.—Contest.*—A husband's will is not a proper exhibit to a complaint by the legatee of a subsequent will by the wife to set aside the probate of her prior will and establish such subsequent will, and a want of power of disposition by contract as shown therein, cannot be considered on demurrer to such complaint.

Heaston v. Krieg, 101, 110 (10).

89. *Complaint.—Wills.—Widow's.—Elections.—Setting Aside.—Fraud.*—A complaint showing that the plaintiff was a widow; that her husband had given her by his will all of his property; that her daughter and daughter's husband, who was a practicing attorney, invited her to their house, where they, together with the circuit judge whom such son-in-law had invited to be present, induced her to elect to renounce the provisions of her husband's will on the ground that he had not the mental capacity sufficient to execute same, states a cause of action for setting aside such election.

Whitesell v. Strickler, 602, 612 (13).

90. *Variance.—Answers to Interrogatories.*—The question of a variance between the pleading and proof cannot be raised on the answers to the interrogatories.

Lake Erie, etc., R. Co. v. Ford, 205, 209 (4).

POLICE POWER—

Municipal Corporations not liable for negligence in exercise of, see MUNICIPAL CORPORATIONS, 4; *Aiken v. City of Columbus*, 139, 141 (1).

Legislature may amend or repeal statutes passed in the exercise of, see CONSTITUTIONAL LAW, 27; *Taylor v. Strayer*, 23, 28 (2).

Qualifications of physicians may be prescribed in the exercise of, see CONSTITUTIONAL LAW, 25; *Spurgeon v. Rhodes*, 1, 11 (9).

Exercise of, is not confiscation, though it may destroy the value of property, see CONSTITUTIONAL LAW, 2; *State v. Richcreek*, 217, 223 (5).

Banking business may be regulated under, see BANKS AND BANKING, 2; *State v. Richcreek*, 217, 222 (2).

Liberty.—Property.—The state may in the proper exercise of the police power sacrifice the property of individuals, curtail natural privileges, and restrict, or entirely take away, the liberty of the citizen. *American Express Co. v. Southern Ind. Express Co.*, 292, 312 (8).

POSSESSION—

Is notice of title, see NOTICE; *Adams v. Betz*, 161, 168 (5).

Relation to crime of larceny, see LARCENY; *Vinnedge v. State*, 415, 420 (9).

Relation to embezzlement, see EMBEZZLEMENT, 2; *Vinnedge v. State*, 415, 418 (4).

POWERS—

See WILLS.

PRESUMPTIONS—

See INSURANCE; JURISDICTION; STATUTES.

That a motorman will not run over person on street, see STREET RAILROADS, 5; *Indianapolis Traction, etc., Co. v. Kidd*, 402, 408 (6).

Where car stops, is proper place to alight, see INTERURBAN RAILROAD, 2; *Indiana, etc., Traction Co. v. Jacobs*, 85, 95 (15).

That debtor claimed his exemption, see FRAUDULENT CONVEYANCES, 6; *Stark v. Lamb*, 642, 647 (7).

Nature of, see EVIDENCE, 36, 37; *City of Indianapolis v. Keeley*, 516, 527 (19), (20).

None, that plaintiff used due care, see EVIDENCE, 35; *City of Indianapolis v. Keeley*, 516, 525 (12).

As to residence, are of fact only, see ALIENS; *Donaldson v. State, ex rel.*, 553, 555 (1).

No presumption of due care, prior to Acts 1899, p. 58, see TRIAL, 50; *City of Indianapolis v. Keeley*, 516, 526 (16).

PRINCIPAL AND AGENT—

See MALICIOUS PROSECUTION.

Liability of, for malicious prosecution, see MALICIOUS PROSECUTION, 1-4; *Farmers, etc., Ins. Assn. v. Stewart*, 544.

Persons dealing with public officers must take notice of limitations of power to represent public, see OFFICERS, 1; *Hord v. State*, 622, 632 (2).

PRINCIPAL AND AGENT—Continued.

The state is liable for the contracts of its officers, only where a statute expressly authorizes such contract, see **CONTRACTS**, 12; *Hord v. State*, 622, 631 (1).

1. *Contracts.—Personal Liability.*—An agent, disclosing his principal and acting within the scope of his authority, is not personally liable on contracts executed on behalf of such principal.
Hayes v. Shirk, 569, 578 (11).
2. *Agents' Profits.—When Belong to Principal.*—Where plaintiff employed defendant as his agent to sell his land, and, after advertising same, defendant failed to make a sale, plaintiff telling defendant after the failure that if he got hold of a piece of ground to sell on which plaintiff could apply his land as part pay to let him know; and defendant offered plaintiff a tract which he and others held for speculative purposes, telling him all about the owners and their profits before the completion of the sale, the plaintiff cannot, after effecting the sale, recover from defendant and such others their profits in the transaction on the theory that defendant was his agent, and that the others knew such fact before such sale.
Pomeroy v. Wimer, 440, 446 (2), 452 (2).
3. *Agent Buying from, or Selling to, Himself.*—A confidential agent with power to buy and sell may not, without a full disclosure to his principal, buy from, nor sell to himself.
Pomeroy v. Wimer, 440, 447 (3), 450 (3).
4. *Powers of Agents.—Profits.*—Where an alleged agent had no power of sale, and his employment consisted solely of introducing his principal to a proposed purchaser, the principal making or refusing to contract without let or hindrance, such alleged agent cannot, as a matter of law, be held to bear such relation to the principal as that his profits derived from the sale effected shall belong to said principal.
Pomeroy v. Wimer, 440, 448 (4).
5. *Serving Two Masters.*—Where an agent's sole duty consists in bringing parties together, and they reserve the exclusive power to contract, such agent may serve both and be entitled to compensation from both, regardless of their knowledge of his relations.
Pomeroy v. Wimer, 440, 451 (8).
6. *Agent's Sale to Principal.*—Where an agent's sole duty is to introduce his principal to a proposed purchaser, such agent, after disclosure of his interest, may sell directly to such principal, and be entitled also to his commission as agent.
Pomeroy v. Wimer, 440, 452 (9).

PRINTING PRESS—

Not required by factory act to be guarded, see **MASTER AND SERVANT**; *Bemis Indianapolis Bag Co. v. Krentler*, 653, 658 (3).

PROXIMATE CAUSE—

See **NEGLIGENCE**.

PUBLIC POLIOY—

Requires judges to be competent and disinterested, see **COURTS**, 7; *Juliana v. State*, 421, 424 (4).

Anything which prevents competition, contrary to, see **COMPETITION**; *American Express Co. v. Southern Ind. Express Co.*, 292, 312 (7).

QUIETING TITLE—

See MORTGAGES.

Possession is notice of title, see NOTICE; *Adams v. Betz*, 161, 168 (5).

Suit for, may be joined with one for reformation of deed, see ACTION, 2; *Adams v. Betz*, 161, 168 (4).

1. *Answer in Denial.—Sustaining Demurrer to Subsequent Answer.*—It is not error to sustain a demurrer to a second paragraph of answer to title in a foreclosure suit where the title is in issue, when the general denial is already pleaded, all defenses being admissible thereunder.

City of Covington v. Ferguson, 42, 47 (3).

2. *Boundaries.—Parol Partitions.*—Where heirs divide lands, giving to plaintiff fourteen acres from the west side of an eighty-acre tract, the other heirs selling their tracts to defendant's grantor, and the plaintiff and such grantor orally established the boundary line and built a fence thereon, maintaining the same ten years, the defendant purchasing from the grantor such tract, "except fifteen acres" off of the west end, such purchased tract containing sixty-five acres "more or less," plaintiff is entitled to a decree quieting his title to the lands up to such fence, especially since defendant knew of such division and since the other heirs and such grantor subsequently conveyed to him all land within the boundaries marked by such fence.

Adams v. Betz, 161, 164 (3).

RAILROAD COMMISSION—

Appeals from, see APPEAL AND ERROR, 77-81.

Appeals from suits to revise orders of, in reference to interlocking devices, lie, if at all, to Appellate Court, see APPEAL AND ERROR, 75; *Grand Trunk, etc., R. Co. v. Railroad Com., etc.*, 261, 262 (1).

RAILROADS—

See CARRIERS; INTERURBAN RAILROADS; NEGLIGENCE; STREET RAILROADS.

Setting fires, complaint for, see PLEADING, 72-74; *Lake Erie, etc., R. Co. v. Ford*, 205.

Complaint for negligence at highway crossing, see PLEADING, 68-71; *Chicago, etc., R. Co. v. McCandish*, 648.

Complaint for negligence in setting hand-car on farm crossing, causing horses to frighten, see PLEADING, 64-67; *Baltimore, etc., R. Co. v. Slaughter*, 330.

Sufficiency of evidence to establish liability of, for setting fires, see NEW TRIAL, 9; *Cleveland, etc., R. Co. v. Hayes*, 454, 460 (12).

Evidence in cases of setting fires, see EVIDENCE, 38, 39; *Cleveland, etc., R. Co. v. Hayes*, 454, 458 (8), 461 (13).

Appeal from order fixing point of crossing for interurban railroad, see APPEAL AND ERROR, 59; *Terre Haute, etc., R. Co. v. Indianapolis, etc., Co.*, 193, 196 (3).

Interrogatories in fire-setting case, see TRIAL, 47; *Cleveland, etc., R. Co. v. Hayes*, 454, 458 (5).

Instructions as to negligently setting fires, see TRIAL, 29, 30; *Lake Erie, etc., R. Co. v. Ford*, 205, 209 (5), 212 (7).

RAILROADS—Continued.

- "Invitation" to cross track, see WORDS AND PHRASES, 4; *Baltimore, etc., R. Co. v. Slaughter*, 330, 337 (5).
1. *Negligence.—Placing Hand-Car in Way.*—A railroad company is liable for injuries caused by its negligence in placing a hand-car, calculated to frighten ordinarily gentle horses, at the side of a farm crossing way.
Baltimore, etc., R. Co. v. Slaughter, 330, 343 (16).
 2. *Highway Crossing.—Care Required.—Travelers.—Trespassers.*—Railroad companies must use ordinary care to prevent injuries to travelers at highway crossings, and must refrain from wilful injuries to trespassers.
Chicago, etc., R. Co. v. McCandish, 648, 652 (2).
 3. *Setting Fires.—Spark-Arresters.*—Railroad companies must not only use the best and most approved spark-arresters, but they must keep them in good condition while in use.
Cleveland, etc., R. Co. v. Hayes, 454, 457 (1).
 4. *Spark-Arresters.—Inspection.—Care Required.*—Railroad companies cannot be held guiltless of negligence as to their care in using an unsafe spark-arrester merely from the fact that they had employed a competent inspector; but they must show that the inspection was a reasonably careful one.
Cleveland, etc., R. Co. v. Hayes, 454, 459 (9).

REAL PROPERTY—

- See DEEDS; EASEMENTS; TRUSTS; VENDOR AND PURCHASER; WILLS.
- Descent of, see DESCENT AND DISTRIBUTION.
- Complaint for deprivation of lateral support, see PLEADING, 39, 40; *Schmoe v. Cotton*, 364, 366 (2), 369 (8).
- Boundary line may be established by parol contract, see PARTITION; *Adams v. Betz*, 161, 169 (7).
- Complaint on contract to sell, see PLEADING, 5; *Howard v. Adkins*, 184, 190 (6).
- Possession is notice of title, see NOTICE; *Adams v. Betz*, 161, 168 (5).
- Destruction of lateral support, when cause of action for, accrues, see LIMITATION OF ACTIONS; *Schmoe v. Cotton*, 364, 371 (14).
- Damages for loss of lateral support, see DAMAGES, 4, 5; *Schmoe v. Cotton*, 364, 367 (3), 369 (9).
- Contracts for sale of, see CONTRACTS, 13-15; *Howard v. Adkins*, 184.
- Sale of 120 acres of land "more or less," see CONTRACTS, 1; *Howard v. Adkins*, 184, 191 (11).
- Lateral Support.—Buildings.—Negligence.*—Defendant is absolutely liable for damages to plaintiff's land in its natural condition caused by removing its lateral support, but is liable only on the ground of negligence in causing plaintiff's building to fall because of removal of the lateral support.
Schmoe v. Cotton, 364, 368 (4).

RECEIVERS—

Owners of property may appeal from allowances to, see **APPEAL AND ERROR**, 86; *Polk v. Johnson*, 548, 551 (2).

Are necessary parties to appeals, where property in their charge would be subjected to payment of judgment, see **APPEAL AND ERROR**, 87; *Polk v. Johnson*, 548, 551 (3).

Time within which to appeal from order appointing, see **APPEAL AND ERROR**, 9; *Barney v. Elkhart County Trust Co.*, 505, 507 (4).

RECORDING—

Failure in, does not impair express trust, see **TRUSTS**, 3; *Ellison v. Ganiard*, 471, 487 (5).

REFORMATION—

Parties to suit for reformation of a deed, see **ACTION**, 2; *Adams v. Betz*, 161, 168 (4).

REHEARING—

See **APPEAL AND ERROR**, 76.

REPLEVIN—

As to parties and pleading, see **PLEADING**, 60-62; *Jackson v. Morgan*, 528.

Effect of judgment in, see **JUDGMENT**, 18-23; *Jackson v. Morgan*, 528.

1. *Judgment.—Return of Property.—Damages.—Statutes.*—Section 558 Burns 1901, §549 R. S. 1881, providing that in actions for the recovery of personalty the jury must assess the value of the property and the damages for detention, when their verdict is for the recovery of such property, and §581 Burns 1901, §572 R. S. 1881, providing that judgment for either party in a replevin action, may be for the return of the property, or its value, in case return cannot be had, and damages for detention, contemplate that the verdict in replevin cases must settle the right to the custody of the property, its value, and the damages for detention. *Jackson v. Morgan*, 528, 532 (2).

2. *Issues.—Return of Property.*—If the evidence under a general denial to plaintiff's replevin case shows defendant's right to the custody of the property, he is entitled to a judgment ordering a return thereof. *Jackson v. Morgan*, 528, 533 (5).

3. *Damages.—Elements of.*—The claim for damages, in an action in replevin, where there is a judgment for the return of the property, includes the value of such property as well as all other damages, such claim for damages being indivisible. *Jackson v. Morgan*, 528, 534 (10).

REPLY—

See **PLEADING**.

REPUBLICAN PARTY—

Courts take judicial notice that there is but one, in Indiana, see **EVIDENCE**, 28; *State, ex rel., v. Board, etc.*, 276, 284 (4).

RESCISSION—

Of widow's election, see **WILLS**, 23-31; *Whitesell v. Strickler*, 602.

RESIDENCE—

Presumptions as to, see **ALIENS**; *Donaldson v. State, ex rel.*, 553, 555 (1).

RES IPSA LOQUITUR—

Not applicable to injuries from defective streets, see **EVIDENCE**, 32; *City of Indianapolis v. Keeley*, 516, 525 (11).

RES JUDICATA—

See **JUDGMENT**.

RESTRAINT OF TRADE—

See **COMPETITION**.

ROADS—

See **HIGHWAYS**.

SALES—

See **CONTRACTS**; **FRAUDULENT CONVEYANCES**; **INTOXICATING LIQUORS**; **PRINCIPAL AND AGENT**.

Answer of worthless goods, see **PLEADING**, 63; *Price v. Huddleston*, 536, 540 (5).

1. *Goods of Inferior Quality.—Retention.—Tender.—Recovery of Value.*—Where defendant contracted for a certain quality of goods, and plaintiff delivered an inferior quality thereof, and defendant received same and failed to return or to tender same back to plaintiff, defendant is liable for the actual value thereof.
Price v. Huddleston, 536, 541 (6).
2. *Goods.—Refusal to Accept Inferior Quality.*—Defendant has the legal right to refuse to accept goods inferior in quality, where his contract calls for a superior quality.
Price v. Huddleston, 536, 543 (10).

SCHOOLS—

No liability for negligence as to, see **MUNICIPAL CORPORATIONS**, 4; *Aiken v. City of Columbus*, 139, 141 (1).

SELF-DEFENSE—

See **CRIMINAL LAW**.

SPECIAL PRIVILEGES—

See **CONSTITUTIONAL LAW**.

SPECIFIC—

Motion to make more specific, see **PLEADING**, 45-47.

STARE DECISIS—

Where decisions are in conflict, Supreme Court will follow rule which seems most fair, see **APPEAL AND ERROR**, 110; *Glens Falls Ins. Co. v. Michael*, 659, 699 (19).

STATE BOARD OF MEDICAL REGISTRATION AND EXAMINATION—

May try a physician for immorality, and if guilty, may revoke his license, see **INJUNCTION**, 7; *Spurgeon v. Rhodes*, 1, 9 (6).

STATUTE OF USES—

See **DEEDS**.

STATUTES—

See **CONSTITUTIONAL LAW**; **DRAINS**; **HIGHWAYS**.

For statutes cited and construed, see p. xxix.

Are conclusive notice to all, of the law, see **OFFICERS**, 8; *Sherrick v. State*, 345, 357 (10).

Construction of ordinances, see **MUNICIPAL CORPORATIONS**.

Repeal of, without saving clause as to costs, compels each party to pay his own, see **COSTS**, 1; *Taylor v. Strayer*, 23, 31 (12).

Civil procedure act of 1903 (Acts 1903, p. 338), liberally construed, see **APPEAL AND ERROR**, 29; *Hayes v. Shirk*, 569, 575 (7).

Meaning of certain words and phrases in statutes regulating sales of liquors, see **WORDS AND PHRASES**, 6-8; *State v. Bock*, 559.

"Purview," meaning of, see **WORDS AND PHRASES**, 1; *State, ex rel., v. Ives*, 13, 18 (5).

1. *Amendatory.—Subject-Matter.—Constitutional Law.*—The provisions of an amendatory statute must, to be valid, be germane to the amended statute. *State v. Bock*, 559, 563 (3).
2. *Amendatory.—Effect of, on Subsequent Conduct.*—With reference to subsequent conduct, an amendatory statute must be considered as a part of the original act at the time of the original enactment. *State v. Bock*, 559, 564 (5).
3. *Construction.—Banks and Banking.—Capital.*—The act of 1905 (Acts 1905, p. 182, §3) requiring that the owners of unincorporated banks shall certify to the Auditor of State that their individual net worth is at least double the amount invested as capital in such banks, does not prohibit such owners from using all of their money in the banking business. *State v. Richcreek*, 217, 228 (11).
4. *Validity.—Banks and Banking.—Residence of Owners.*—The act of 1905 (Acts 1905, p. 182, §3) requiring that at least one partner, in a partnership bank, and the owner of an individual bank, shall be residents of the State, is valid. *State v. Richcreek*, 217, 229 (14).
5. *To Whom Applicable.—Embezzlement.—Burden of Proof.*—The burden to prove beyond a reasonable doubt that defendant, Auditor of State, is within the statute defining embezzlement, is upon the State. *Sherrick v. State*, 345, 356 (8).
6. *Doubts.—Construction by Administrative Departments.—Usage.*—Where a statute is plain and free from doubt, the courts, in the construction thereof, will not resort to the construction placed thereon by the administrative departments, nor can the meaning thereof be changed or varied by usage. *Hord v. State*, 622, 641 (8).
7. *Reënactment of, after Judicial Construction.—Presumptions.*—The reënactment of a provision in an act, after a judicial construction has been given thereto, raises a presumption that the legislature intended the reënacted provision to receive the same construction as the prior one. *Kunkle v. Abell*, 434, 437 (2).
8. *Construction.—Criminal Law.—Without the Letter, Within the Spirit.*—An act not within the words of a criminal statute cannot be adjudged a crime because it is within the reason or spirit of such statute; and all doubts are resolved in favor of the accused. *Sherrick v. State*, 345, 354 (7).
9. *Construction.—Reënactment.—Presumptions.*—Where a statute which is given a certain construction by the Supreme Court

STATUTES—Continued.

is substantially reenacted, the presumption is that such construction was carried into the new statute; and it will be so construed in the absence of words indicating a contrary intent.

State v. Dorsey, 199, 203 (2).

10. *Construction.—Contemporaneous Legislation.*—The act of 1905 (Acts 1905, p. 219) concerning municipal corporations, must be construed in connection with contemporaneous, kindred legislation.

State, ex rel., v. Ives, 13, 22 (11).

11. *In Pari Materia.—Construction.—Repeal.—Implication.—Presumptions.*—Ordinarily, statutes concerning the same subject-matter, passed at the same session, must be construed *in pari materia*, the presumption against a repeal by implication being strong.

State, ex rel., v. Ives, 13, 22 (12).

12. *Intoxicating Liquors.—Remonstrance.—Number of Voters.—How Determined.*—The act of 1905 (Acts 1905, p. 7, §7283i Burns 1905), providing that the number of voters necessary to a successful remonstrance against the granting of a license to retail intoxicating liquors shall be a majority of the aggregate number of votes cast for any of the candidates "for any office at the last election preceding the filing of such remonstrance," refers to the last preceding general and not special election.

Kunkle v. Abell, 434, 438 (3).

13. *Intoxicating Liquors.—Remonstrance.—Number of Voters Required.*—Under §7283i Burns 1905, Acts 1905, p. 7, the number of remonstrants necessary successfully to oppose the granting of a license to retail intoxicating liquors consists of the majority of the aggregate votes received by all candidates for any office voted for at the last general election held in the township or city ward.

Kunkle v. Abell, 434, 438 (4).

14. *Elections.—Municipal Corporations.—Councilmen.*—The act of 1891 (Acts 1891, p. 33, §3484 Burns 1901), providing that vacancies in certain city offices should be filled by appointment of the common council, did not repeal §12 of the act of 1867 (Acts 1867 [s. s.], p. 33, §3480 Burns 1901, §3047 R. S. 1881), providing that in case of a tie vote for municipal candidates, a new election should be ordered.

State, ex rel., v. Ives, 13, 16 (1).

15. *Elections.—Municipal Corporations.—Councilmen.*—Section 53 of the act of 1881 (Acts 1881 [s. s.], p. 482, §6286 Burns 1901, §4731 R. S. 1881), providing for special elections in certain cases, applies to cities, and was in force at the time of the passage of the act of 1905 (Acts 1905, p. 219), concerning municipal corporations.

State, ex rel., v. Ives, 13, 17 (2).

16. *Elections.—Municipal Corporations.—Tie Vote.*—In determining whether a tie vote for councilmen of a city requires a special election, the court, besides considering the municipal corporations act of 1867 (Acts 1867 [s. s.], p. 33, §12, §3480 Burns 1901, §3047 R. S. 1881) and the general election law of 1881 (Acts 1881 [s. s.], p. 482, §53, §6286 Burns 1901, §4731 R. S. 1881), will consider the act of 1905 (Acts 1905, p. 189, §6), providing that in case of a tie vote for municipal officers, such fact should be certified to the tribunal whose duty it is to issue a writ of election to fill the same, as indicating whether the legislature intended that the act of 1905 (Acts 1905, p. 219), concerning municipal corporations, should repeal all former legislation relating thereto.

State, ex rel., v. Ives, 13, 17 (3).

STATUTES—Continued.

17. *Municipal Corporations.—Tie Vote.—Special Election.*—The act of 1905 (Acts 1905, p. 219), concerning municipal corporations, did not repeal §3480 Burns 1901, §3047 R. S. 1881, Acts 1867 (s. s.), p. 33, §12, nor §6286 Burns 1901, §4731 R. S. 1881, Acts 1881 (s. s.), p. 482, §53, providing for a special election for certain municipal officers in case of a tie vote.

State, ex rel., v. Ives, 13, 22 (13).

18. *Repealing Clause.*—A repealing clause in form: "All former laws within the purview of this act, except laws not inconsistent herewith and enacted at the present session of the General Assembly, are hereby repealed," does not repeal all prior legislation which has some relation to the subject of such repealing statute.

State, ex rel., v. Ives, 13, 18 (4).

19. *Repeal.—Saving Clause.—Pending Actions.*—The repeal, without a saving clause, of a statute giving a right of action takes away all rights under such statute except those embodied in a final judgment.

Taylor v. Strayer, 23, 28 (3).

20. *Repeal.—Penalties.—Forfeitures.—Drains.*—Section 248 Burns 1901, §248 R. S. 1881, providing: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide," refers only to penalties, forfeitures and kindred liabilities, and not to the establishment of drains.

Taylor v. Strayer, 23, 30 (10).

21. *Repeal.—Saving Statutes.*—Section 243 Burns 1901, §243 R. S. 1881, providing that no suits instituted under existing laws shall be affected by the repeal thereof, referred primarily to the laws of 1852, and the repealing clause of the act of 1905 (Acts 1905, pp. 456, 480, §14) is not controlled thereby.

Taylor v. Strayer, 23, 30 (11).

22. *Officers.—Vacancies.—Municipal Corporations.*—The failure to elect a councilman does not thereby create a "vacancy" in that office, at the commencement of the new term, by virtue of §45 of the act of 1905 (Acts 1905, pp. 219, 242), providing for filling vacancies in municipal offices.

State, ex rel., v. Ives, 13, 21 (10).

STREET RAILROADS—

See CARRIERS; INTERURBAN RAILROADS; MUNICIPAL CORPORATIONS; NEGLIGENCE; RAILROADS.

Complaint in cases of injuries to passengers in alighting, see PLEADING, 78-85; *Indianapolis St. R. Co. v. Ray*, 236.

Right to use streets, see MUNICIPAL CORPORATIONS, 23; *Indianapolis Traction, etc., Co. v. Kidd*, 402, 407 (3).

Courts take judicial notice that street railroads are passenger carriers, see EVIDENCE, 29; *Indianapolis St. R. Co. v. Ray*, 236, 240 (4).

Contributory negligence of woman alighting from moving train, question for jury, see CARRIERS, 4; *Wabash River Traction Co. v. Baker*, 262, 264 (1).

Instructions as to care required of, and of passenger, see TRIAL, 31-34; *Wabash River Traction Co. v. Baker*, 262.

1. *Carriers.—Gratuitous Carriage.—Invitation.*—Where an officer of a street railroad company, on behalf of such company, invited a visiting order, composed of women of whom plaintiff

STREET RAILROADS—Continued.

was one, to take a free trolley ride on one of such company's cars, the acceptance of such invitation by taking passage on the car constituted the plaintiff a passenger.

Indianapolis Traction, etc., Co. v. Klentschy, 598, 600 (3).

2. *Carriers.—Gratuitous Carriage.—Negligence.—Liability.*—Carriers are liable to passengers for negligence resulting in damage, though the carriage is gratuitous.

Indianapolis Traction, etc., Co. v. Klentschy, 598, 601 (4).

3. *Use of Streets.—Rights of Others.*—Street railroad companies have no superior rights in the use of the streets occupied by their tracks, but they have the right not to be unnecessarily interfered with or obstructed in the running of their cars.

Indianapolis Traction, etc., Co. v. Kidd, 402, 407 (2).

4. *Tracks.—Pedestrians Using.—Rights.*—Street railroad companies cannot lawfully exclude pedestrians from their tracks, but it is the duty of such pedestrians when they ascertain or are notified of the approach of a car temporarily to abandon the track to let the car pass.

Indianapolis Traction, etc., Co. v. Kidd, 402, 408 (5).

5. *Running Down Pedestrians.—Presumptions.*—A pedestrian, walking along a street car track, has the right to presume that cars will not be run at an excessive speed, and that a car, approaching from the rear, will not be run over her without warning.

Indianapolis Traction, etc., Co. v. Kidd, 402, 408 (6).

6. *Negligence.—Failure to Observe.*—It is the duty of the motorman operating a street car to use ordinary care for the safety of persons or vehicles upon the track, but such care implies a high degree of watchfulness and vigilance when the car is running at a rapid speed in a populous part of a city.

Indianapolis Traction, etc., Co. v. Kidd, 402, 409 (7).

7. *Running Down Pedestrians.—Contributory Negligence.*—A lady walking between the street car tracks, who looked for a car before she entered upon the track, and again after traveling half a square, the track being clear of ice and snow, and the sidewalk and rest of the street being covered therewith, and who was run over by a car approaching without warning from the rear, is not guilty of contributory negligence as a matter of law.

Indianapolis Traction, etc., Co. v. Kidd, 402, 409 (8).

8. *Running Down Pedestrian.—Proximate Cause.—Contributory Negligence.*—Where a woman looked for an approaching car and saw none before going upon a street car track, and after walking half a square looked back for a car and saw none, her continuing to walk on such track without looking back is not a proximate, but a remote, cause of an injury occasioned by the motorman's running his approaching car, without warning, against her.

Indianapolis Traction, etc., Co. v. Kidd, 402, 410 (11).

STREETS—

See MUNICIPAL CORPORATIONS.

SUPPLEMENTAL COMPLAINT—

See PLEADING, 19, 20.

SUPREME COURT—

See COURTS.

TAXATION—

As to gravel road taxing districts, see **HIGHWAYS**, 4-12; *Spaulding v. Mott*, 58.

Legislature has power to create taxing districts for construction of gravel roads, see **CONSTITUTIONAL LAW**, 17, 18; *Spaulding v. Mott*, 58, 66 (6), 67 (7).

TENDER—

See **SALES**.

THEORY—

See **PLEADING**.

Of case in trial court must be adhered to, on appeal, see **APPEAL AND ERROR**, 108; *Donaldson v. State, ex rel.*, 553, 558 (4).

TORTS—

Whether complaint is in, or on contract, see **PLEADING**, 23-28; *Flint & Walling Mfg. Co. v. Beckett*, 491.

1. *Contracts.—Breach.—Action.*—A person engaged in a private enterprise whose only relationship with plaintiff grows out of a contract, may be liable in tort for damage committed in the execution of the work of carrying out such contract.

Flint & Walling Mfg. Co. v. Beckett, 491, 498 (1).

2. *Contracts.—Breach of Duties under.*—The breach of a contractual duty to use care in reference to another's property constitutes a tort the same as the breach of a legally imposed duty apart from contract.

Flint & Walling Mfg. Co. v. Beckett, 491, 498 (2).

3. *Negligence.—Contracts.—Due Care.—Action.—Case.—Assumpsit.*—Where through contractual relations defendant enters upon a work attended with risk to the person or property of the plaintiff, a failure by defendant to exercise ordinary care therein entitles the plaintiff to an action on the case or in assumpsit at his election.

Flint & Walling Mfg. Co. v. Beckett, 491, 498 (3).

4. *Negligence.—Contracts.—Action.*—A breach of a contract, unattended by any negligence, does not give rise to an action in tort.

Flint & Walling Mfg. Co. v. Beckett, 491, 498 (4).

5. *Negligence.—Contracts.—Breach.—Action.—Recovery.—Election.*—Plaintiff may elect to sue in tort or on contract for a negligent breach of contract, but he cannot have two compensations for the same loss.

Flint & Walling Mfg. Co. v. Beckett, 491, 499 (5).

6. *Assumpsit.—Origin of.*—The action of assumpsit historically developed from the enforcement of liability in tort.

Flint & Walling Mfg. Co. v. Beckett, 491, 499 (6).

TOWNSHIP TRUSTEES—

Bribery by candidate for, disqualifies, see **ELECTIONS**, 8-13; *Tinkle v. Wallace*, 382.

Duties of, with reference to drains, see **DRAINS**, 5, 6; *Quick v. Parratt*, 31, 34 (2), 35 (3).

TOWNSHIPS—

Not liable for cost of cleaning drains, though trustee orders it done, see **DRAINS**, 6; *Quick v. Parratt*, 31, 35 (3).

TRANSCRIPT—

See APPEAL AND ERROR.

TRANSFER—

See APPEAL AND ERROR; COURTS.

TREASURER OF STATE—

Duty of, to receive insurance fees, see OFFICERS, 9; *Sherrick v. State*, 345, 358 (11).

TRESPASS—

Owner, not liable to trespasser for negligence, see NEGLIGENCE, 13; *Baltimore, etc., R. Co. v. Slaughter*, 330, 334 (1).

Relation to embezzlement, see EMBEZZLEMENT, 1; *Vinnedge v. State*, 415, 418 (3).

1. *Entry of House by Legal Process.—Examination of Party.—Discovery.*—Plaintiff may lawfully refuse to permit defendant's attorneys and a notary public to enter his house for the purpose of taking his examination as a party to his action.

McSwane v. Foreman, 171, 176 (6).

2. *Entry of House.—Breach of Legal Right.—Matters in Aggravation.*—The invasion of a person's right to security and liberty constitutes a trespass; and wrongs done after such invasion are merely in aggravation of such trespass.

McSwane v. Foreman, 171, 177 (9).

3. *Entry of House by Legal Process.—Examination of Party.*—The process served upon a party requiring him to submit to an examination as a witness in his own house is invalid, and he does not waive his right to object thereto by failing to refuse permission at the time of service, his abandonment of the house and locking the door being sufficient notice of refusal.

McSwane v. Foreman, 171, 178 (10).

TRIAL—

See NEW TRIAL.

Claimant against decedent's estate must prove execution of instrument, see PLEADING, 3; *Digan v. Mandel*, 586, 594 (11).

Burden is on State to show that embezzlement statute applies to Auditor of State, see STATUTES, 5; *Sherrick v. State*, 345, 356 (8).

On *venire de novo*, no question can be raised on interrogatories to jury, see PLEADING, 49; *Spaulding v. Mott*, 58, 72 (17).

When answers to interrogatories control general verdict, see JUDGMENT, 29; *Indianapolis Traction, etc., Co. v. Kidd*, 402, 409 (9).

Finding of a fact estops party from questioning same, where opponent's evidence thereof was improperly excluded on such party's motion, see HIGHWAYS, 12; *Spaulding v. Mott*, 58, 71 (14).

Where interrogatories show certain facts in favor of defendant, exclusion of his evidence to establish same, harmless, see EVIDENCE, 41; *Indianapolis Traction, etc., Co. v. Kidd*, 402, 413 (15).

Objection that certain evidence is incompetent, insufficient, see EVIDENCE, 40; *Hasper v. Weitcamp*, 371, 375 (7).

TRIAL—Continued.

Burden of proving contributory negligence is on defendant, see EVIDENCE, 2; *City of Indianapolis v. Keeley*, 516, 526 (18).

Exclusion of evidence, how questioned, see ELECTIONS, 13; *Tinkle v. Wallace*, 382, 392 (14).

Court has right to apportion costs, see COSTS, 2, 3; *Whitesell v. Strickler*, 602, 621 (27), (28).

Supreme Court ordinarily decides case on the merits, regardless of technicalities, see APPEAL AND ERROR, 107; *Aiken v. City of Columbus*, 139, 151 (14).

Appellant cannot complain of instruction given at his request, see APPEAL AND ERROR, 102; *Indianapolis Traction, etc., Co. v. Kidd*, 402, 413 (17).

When erroneous instruction is reversible error, see APPEAL AND ERROR, 103, 104.

On appeal, is by the record, see APPEAL AND ERROR, 96; *State, ex rel., v. Board, etc.*, 276, 287 (9).

Error in giving instructions cannot be assigned independently on appeal, see APPEAL AND ERROR, 17; *Wurfel v. State*, 191, 192 (1).

Waiver of right to question granting of change of venue or appointment of special judge, see ACTION, 4; *Whitesell v. Strickler*, 602, 620 (26).

Burden of proving that widow's election was free from fraud, on heirs, see WILLS, 26; *Whitesell v. Strickler*, 602, 612 (12).

1. *Special Findings.—Aliens.—Domicile.*—A special finding showing that decedent was born in Scotland in 1811, removed to United States in 1860, became a resident of Indiana in 1865, remained there until 1883 when he became a resident of Alabama, returned to Scotland in 1896 and died there in 1898, is not a finding that decedent was a resident of Scotland at the time of his death. *Donaldson v. State, ex rel.*, 553, 558 (3).

2. *Argument of Counsel.—Misconduct.—Failure to Object.*—Failure of the complaining party to object, at the time, to offensive remarks of counsel in the argument to the jury, waives any right to object thereto afterwards.

Hasper v. Weitcamp, 371, 374 (5).

3. *Theory.—Bills and Notes.—Title.—Allegations.—Evidence.—Variance.*—Title to a note must be proved as laid in the complaint or the result will be a fatal variance.

Digan v. Mandel, 586, 591 (6).

4. *Burden of Proof.—Contributory Negligence.—Want of Ordinary Care.—Municipal Corporations.*—The burden of proving contributory negligence and that plaintiff did not use care in proportion to the known danger in using a defective street, is upon the defendant city.

City of Indianapolis v. Keeley, 516, 523 (9).

5. *Negligence.—Burden of Proof.*—Prior to the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) the burden was upon plaintiff, in a personal injury case, to prove defendant's negligence and his own exercise of due care.

City of Indianapolis v. Keeley, 516, 526 (15).

6. *Burden of Proof.—Bills and Notes.—Alterations.*—The burden of proving material, unsuspecting alterations in a note, subsequent to its execution, is upon defendant.

Digan v. Mandel, 586, 593 (10).

TRIAL—Continued.

7. *Evidence Admitted After.—Discretion.—Appeal and Error.*—Permission to admit in evidence the gravel road petition, the endorsement thereof by the auditor, the notice of presentation and affidavit of proof of posting, several days after the close of the trial of a suit to enjoin further proceedings in a gravel road case, is discretionary with the trial court, which discretion is subject to review only for abuse. *Todd v. Crail*, 48, 57 (11).
8. *Evidence.—Original.—Rebuttal.—Discretion of Court.—Appeal and Error.*—The admission of original evidence in rebuttal is within the discretion of the trial court, such discretion being reviewable on appeal only for abuse.
Tinkle v. Wallace, 382, 393 (15).
9. *Issues.—Answers.—Cross-Complaint.*—Where cross-complaints contained the same facts alleged in answers, sustaining a demurrer to such answers was harmless, since the facts were provable under the cross-complaints.
City of Covington v. Ferguson, 42, 47 (5).
10. *Issues.—Boards of Commissioners.—Appeal and Error.*—Ordinarily, on an appeal from the board of commissioners, only the issues raised before such board may be litigated in the circuit court.
Taylor v. Strayer, 23, 29 (7).
11. *Issues.—Drains.—Appeal from Board.—Jurisdiction.—Statutes.*—A plea to the jurisdiction, founded upon a statute passed subsequently to an appeal from the board of commissioners in a drainage proceeding, should be entertained by the circuit court, though ordinarily only such issues may be litigated in the circuit court as were presented to such board.
Taylor v. Strayer, 23, 31 (13).
12. *Instructions.—When Reversible.—Error in the giving of instructions is not reversible unless the jury was thereby misled.*
Indiana, etc., Traction Co. v. Jacobs, 85, 94 (10).
13. *Instructions.—Hypothesis.—Omission of Fact from.*—The omission of one fact from an hypothesis relative to negligence in an instruction is not necessarily misleading.
Indiana, etc., Traction Co. v. Jacobs, 85, 95 (12).
14. *Instructions.—Applicability.*—It is not error to refuse to give an instruction not applicable to the case.
Beery v. Driver, 127, 133 (7).
15. *Instructions.—Assumption of Facts.*—An instruction that plaintiff is entitled to damages "for being deprived of freedom of action, and social meeting and intercourse with her friends, which you shall believe from the evidence in this cause, she would have enjoyed," does not assume that plaintiff was deprived of her freedom or friends, the language clearly limiting recovery to the proof.
Indianapolis St. R. Co. v. Ray, 236, 244 (15).
16. *Instructions.—Prejudicial.—Presumptions.*—An erroneous instruction applicable to every count in an indictment is presumed to be prejudicial and therefore reversible error.
Sherrick v. State, 345, 363 (18).
17. *Instructions.—Legal Effect of Undisputed Facts.*—When *Questions for Jury.*—An instruction setting out the facts constituting the business relations between plaintiff and defendant should not state the legal effect of such acts where different inferences could reasonably be drawn therefrom, such deduction being for the jury.
Pomeroy v. Wimer, 440, 445 (1).

TRIAL—Continued.

18. *Instructions.—Incomplete.—Duty of Parties.*—Where an instruction is incomplete, but correct so far as it goes, the complaining party, to save any question thereon, must, at the proper time, present a complete instruction and request that it be given.
Price v. Huddleston, 536, 542 (8).
19. *Instructions.—Criminal Law.—Homicide.—Self-Defense.—Actual and Apparent Dangers.*—An instruction, in a prosecution for homicide occasioned by defendant's striking deceased a blow with his fist, that defendant could "justify the attack upon deceased only on the theory that at the time he struck the deceased he, the defendant, was in imminent danger of great bodily harm or in imminent danger of losing his life at the hands of the deceased," is erroneous, since it excludes the idea of apparent danger.
Weston v. State, 324, 327 (3).
20. *Instructions.—Curing.—Criminal Law.—Homicide.—Self-Defense.*—A positively incorrect instruction on the right of self-defense in a homicide case, is not cured by the giving of a correct instruction thereon, confusion of the jury upon a vital question probably resulting.
Weston v. State, 324, 329 (7).
21. *Instructions.—Contributory Negligence.—Evidence.—Consideration of.*—The refusal to give an instruction, in an action for damages for negligence, that the burden of proving contributory negligence is on the defendant, but that the jury may consider the plaintiff's evidence in determining such issue, is reversible error, where no other instruction covers such ground.
City of Indianapolis v. Keeley, 516, 524 (10).
22. *Instructions.—Contributory Negligence.—Failure to Mention in Each Instruction.*—Where the jury has been fully and carefully instructed on the question of contributory negligence, it is not necessary for the court to mention such question in the instructions relating to other branches of the case.
Indiana, etc., Traction Co. v. Jacobs, 85, 93 (9).
23. *Instructions.—Negligence.—Contributory.*—Because negligence and contributory negligence may be questions of law for the courts under certain circumstances, it does not follow that an instruction thereon to the jury is necessarily erroneous.
Indiana, etc., Traction Co. v. Jacobs, 85, 94 (11).
24. *Instructions.—Contributory Negligence.*—An instruction that if plaintiff was acting in a careful and prudent manner she was not guilty of contributory negligence, is correct so far as it goes.
Indiana, etc., Traction Co. v. Jacobs, 85, 95 (13).
25. *Instructions.—Damages.—Physical Injuries.—Mental Anguish.*—An instruction in a personal injury case that plaintiff should recover for medical expenses past and future, loss of earnings past and future and bodily pain and mental suffering past and future, is correct.
Indianapolis St. R. Co. v. Ray, 236, 247 (20).
26. *Instructions.—Drains.—Public Utility.*—Where there was evidence tending to show that an existing ditch, if cleaned, would serve all purposes, and that the construction of the proposed drain was an attempt to shift upon others the expense of clearing the obstructions, it was error to instruct that the purpose of petitioners was not a question and that the public utility of the proposed drain was the only question.
Beery v. Driver, 127, 132 (5).

TRIAL—Continued.

27. *Instructions.—Invasion of Province of Jury.—Drains.*—An instruction in a drainage proceeding, which assumes that the proposed drain will reclaim wet lands, render the community more healthful and benefit a public highway, is erroneous where such facts are controverted. *Beery v. Driver*, 127, 133 (6).
28. *Instructions.—Invited Error.*—Where instructions were given at defendant's request inviting an erroneous instruction by the court, defendant cannot complain.
Indiana, etc., Traction Co. v. Jacobs, 85, 93 (8).
29. *Instructions.—Railroads.—Setting Fires.—Care Required.*—An instruction, in an action against a railroad company for negligently setting fires, that if the jury found that the premises adjacent to the track were unusually dry and that a strong wind was blowing in the direction of plaintiff's property defendant would be required to use a greater degree of care than usual, is erroneous, ordinary care under the circumstances being the legal standard.
Lake Erie, etc., R. Co. v. Ford, 205, 209 (5).
30. *Instructions.—Negligence.—Care Required.—Railroads.—Setting Fires.*—An instruction that if the jury finds that if extraordinary circumstances existed causing a locomotive to set fires more easily than usual greater care than usual should be used, does not mean the same as that the railroad company must use ordinary care under the circumstances, and that extraordinary circumstances might be considered in determining the requirements of such ordinary care; and such instruction is misleading.
Lake Erie, etc., R. Co. v. Ford, 205, 212 (7).
31. *Instructions.—Street Railroads.—Care Required.*—An instruction, in an action by a passenger against a street railroad company for damages for personal injuries, that a higher degree of care is imposed upon street railroad companies than steam railroad companies, is erroneous. *Anderson v. Citizens St. R. Co.*, 12 Ind. App. 194, disapproved.
Wabash River Traction Co. v. Baker, 262, 265 (2).
32. *Instructions.—Carriers.—Street Railroads.—Care Required.*—An instruction that it is the duty of a street railroad company to carry its passengers to their destination and set them down as safely as the conveyance employed and the circumstances of the case will permit, is correct.
Wabash River Traction Co. v. Baker, 262, 266 (3).
33. *Instructions.—Carriers.—Street Railroads.—Care Required.*—An instruction that street railroad companies are bound to use greater care toward passengers than steam railroad companies is not misleading, where the jury is further instructed that street railroad companies are not insurers of the safety of their passengers and are liable only when they fail to exercise the highest degree of care to secure their passengers' safety.
Wabash River Traction Co. v. Baker, 262, 266 (4).
34. *Instructions.—Carriers.—Street Railroads.—Alighting from Moving Car.—Contributory Negligence.—Question for Jury.*—An instruction that plaintiff's attempt to alight from a moving car is not conclusive of contributory negligence, but that such question is for the jury, is correct.
Wabash River Traction Co. v. Baker, 262, 266 (5).

TRIAL—Continued.

35. *Verdict.—General.—Import of.*—A general verdict for plaintiff is a finding that the material allegations of the complaint are true.
Indianapolis Traction, etc., Co. v. Klentschy, 598, 600 (1).
36. *Verdict.—General.—Answers.—Which Controls.*—Where the answers to the interrogatories to the jury are in irreconcilable conflict with the general verdict, such answers control.
Farmers, etc., Ins. Assn. v. Stewart, 544, 546 (1).
Cleveland, etc., R. Co. v. Hayes, 454, 458 (6).
Bemis Indianapolis Bag Co. v. Krentler, 653, 655 (1).
37. *Verdict.—General.—Answers.—Conflict.—How Determined.*—In determining whether there is an irreconcilable conflict between the general verdict and the answers to the interrogatories to the jury, the court will look only to the complaint, answer, general verdict and such interrogatories and answers.
Bemis Indianapolis Bag Co. v. Krentler, 653, 655 (2).
38. *Verdict.—General.—Answers.—Conflict.—Negligence.—Factory Act.*—Where the general verdict is a finding of negligence at the common law only, and the answers to the interrogatories to the jury show negligence only by the violation of the factory act (Acts 1899, p. 231, §9, §7087i Burns 1901), such answers are in irreconcilable conflict with the general verdict, and defendant is entitled to judgment.
Bemis Indianapolis Bag Co. v. Krentler, 653, 658 (5).
39. *Interrogatories to Jury.—Answers of Want of Knowledge.—Legal Effect.*—Interrogatories to the jury answered "we cannot state" and "we do not know" are of no legal effect, except that they are not a finding that there was no evidence on the questions involved therein.
Cleveland, etc., R. Co. v. Hayes, 454, 457 (2).
40. *Interrogatories to Jury.—Failure to Answer.—Rights of Parties.*—Where a jury failed to answer interrogatories directly, it is the duty of the court, on motion, to require them to answer definitely.
Cleveland, etc., R. Co. v. Hayes, 454, 457 (3).
41. *Interrogatories to Jury.—Answer of "No Evidence."—Effect.*—An answer of "no evidence" to an interrogatory to the jury, is a finding that the facts involved in such interrogatory are not proved; and the court's duty is to consider such failure in determining whether the general verdict can stand in the absence of such proof.
Cleveland, etc., R. Co. v. Hayes, 454, 457 (4).
42. *Special Findings.—Aider by Presumption.—Failure to Find Material Fact.*—A special finding cannot be aided by presumptions, inferences or intendments; and a failure to find a material fact is a finding against the party having the burden of proof.
Donaldson v. State, ex rel., 553, 557 (2).
43. *Interrogatories to Jury.—Evidence to Overthrow.—Failure of Appellant to Point Out.—Appeal and Error.*—Where appellant complains that an answer to an interrogatory to the jury was incorrect, but fails to point out the evidence overthrowing same in his brief, the Supreme Court need not consider same.
City of Indianapolis v. Keeley, 516, 523 (7).
44. *Interrogatories to Jury.—Failure to Require Answer.—Harmless Error.*—The failure of the court to require the jury

TRIAL—Continued.

to answer more definitely an interrogatory does not constitute reversible error, where the answer would not, in any event, be of a controlling nature.

City of Indianapolis v. Keeley, 516, 523 (8).

45. *General Verdict.—Malicious Prosecution.—Malice.—Want of Probable Cause.*—A general verdict for plaintiff in an action for malicious prosecution is a finding that defendant instituted the prosecution of plaintiff with malice and without probable cause. *Farmers, etc., Ins. Assn. v. Stewart*, 544, 547 (4).

46. *Verdict.—Special.—Malice.—Want of.—Principal and Agent.*—An answer to an interrogatory to the jury, in an action for malicious prosecution against a private corporation and its agent, that there was no malice on the part of such corporation is a finding that such agent's acts, so far as such corporation was liable for same, were without malice.

Farmers, etc., Ins. Assn. v. Stewart, 544, 547 (5).

47. *Interrogatories to Jury.—Railroads.—Setting Fires.—Spark-Arresters.—Care.*—Where the interrogatories to the jury, in an action against a railroad company for negligently setting fires by reason of using a faulty spark-arrester, and in overtaxing its engine, failed to show a thorough inspection of the spark-arrester before starting and also failed to negative negligence in the management of the locomotive, and there was no finding as to the condition of the spark-arrester at the time of the setting of the fire, the general verdict for plaintiff must prevail.

Cleveland, etc., R. Co. v. Hayes, 454, 458 (5).

48. *Negligence.—Contributory.—Issues.*—Where contributory negligence is relied upon, in a personal injury case, the parties virtually charge each other with negligence in respect to the transaction in question, and the burden is upon each to prove the negligence of the other.

City of Indianapolis v. Keeley, 516, 525 (13).

49. *Negligence.—Contributory.—Evidence.—Presumptions.*—Negligence and contributory negligence are questions to be determined by the jury from the proved facts in a case, unaided by presumptions of law.

City of Indianapolis v. Keeley, 516, 526 (14).

50. *Negligence.—Want of Due Care.—Presumptions.*—Under the rule prior to the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) a failure, by the plaintiff in a personal injury case, to prove the exercise of due care, was fatal, since there was no presumption that he had exercised such care.

City of Indianapolis v. Keeley, 516, 526 (16).

51. *Theory.—Pleading.—Evidence.—Variance.*—A plaintiff must recover, if at all, by proof of the allegations of his complaint.

Digan v. Mandel, 586, 591 (5).

52. *Evidence.—Variance.—Amendments.—Appeal and Error.*—Where the complaint shows that defendant railroad company negligently placed its hand-car in plaintiff's farm crossing way, thereby frightening his horses and causing him injury; and the proof shows that the hand-car was placed by the side of such way, the variance is technical, and the complaint will be treated as amended so as to cover such proof.

Baltimore, etc., R. Co. v. Slaughter, 330, 344 (18).

TRIAL—Continued.

53. *Wills. — Probate. — Subsequent Wills. — Burden of Proof.*—Formal proof of a subsequent will is all that is necessary on the part of plaintiff where she is attempting to set aside the probate of a prior will and to probate a subsequent one, the burden of showing such subsequent will to be invalid being upon defendants. *Heaston v. Krieg*, 101, 121 (30).
54. *Special Findings. — Liens. — Assumption of Payment of.*—A special finding that cross-defendant agreed to take the title to the purchased land "subject" to a certain lien, and "assumed" payment thereof, sufficiently shows that such cross-defendant agreed to pay such lien. *Ditchey v. Lee*, 267, 274 (6).
55. *Special Findings. — Vendor and Purchaser. — Bills and Notes. — Contracts.*—Where a vendee executed his note in part consideration for a certain conveyance, the contract requiring the vendee at a certain time to pay such note, whereupon the vendor should execute the deed of conveyance, an offer by the vendor at such time to execute such deed in accordance with the contract, and a refusal of the vendee to pay such note, warrant a recovery by the vendor. *Ditchey v. Lee*, 267, 274 (7).

TRUSTS—

Not affected by bankruptcy of trustee, see **BANKRUPTCY**, 1, 2; *Ellison v. Ganiard*, 471, 488 (7), 489 (9).

1. *Writings. — Deeds.*—A deed of land by a mother to a son accompanied by a written appointment of him as trustee to sell the lands conveyed and to distribute the proceeds equally to her children, which appointment was accepted by such son in writing, constitutes an express trust under §3391 Burns 1901, §2969 R. S. 1881. *Ellison v. Ganiard*, 471, 485 (3).
2. *Powers. — Deeds. — Title Conveyed.*—A deed to a trustee, directing him to convey the property and distribute the proceeds to determinable beneficiaries, is sufficient to authorize him to transmit a fee-simple title to his grantee. *Ellison v. Ganiard*, 471, 487 (4).
3. *Deeds. — Contracts. — Recording.*—The execution of a deed conveying certain lands, together with a separate writing appointing the grantee as a trustee to sell the same and distribute the proceeds to determinable beneficiaries, constitutes, as between the parties, an express trust; and the failure to record such separate writing did not impair the trust. *Ellison v. Ganiard*, 471, 487 (5).
4. *Trustees. — Bankruptcy of. — Effect on Trust Property. — Execution.*—Property held in trust by a bankrupt, not being liable to execution for such bankrupt's debts, does not pass to such bankrupt's trustee under the bankruptcy law of 1898 (30 Stat., pp. 544, 565, §70, U. S. Comp. Stat., p. 3451). *Ellison v. Ganiard*, 471, 488 (6).

VARIANCE—

Must be more than technical, see **TRIAL**, 52; *Baltimore, etc., R. Co. v. Slaughter*, 330, 344 (18).

Evidence must support allegations, see **TRIAL**, 51; *Digan v. Mandel*, 586, 591 (5).

VARIANCE—Continued.

Title to a note must be proved as alleged, see TRIAL, 3; *Digan v. Mandel*, 586, 591 (6).

Question of, cannot be raised on interrogatories to jury, see PLEADING, 90; *Lake Erie, etc., R. Co. v. Ford*, 205, 209 (4).

Where answers to interrogatories show negligence at the common law, and the complaint shows a violation of the factory act, fatal variance, see TRIAL, 38; *Bemis Indianapolis Bag Co. v. Krentler*, 653, 658 (5).

VENDOR AND PURCHASER—

Facts showing right of recovery by vendor, see TRIAL, 55; *Ditchey v. Lee*, 267, 274 (7).

1. *Marketable Title.—Contracts.*—In the absence of an agreement to the contrary, the vendor of real estate is required to convey a marketable title. *Ditchey v. Lee*, 267, 272 (2).

2. *Marketable Title.—Wills.—Estates.*—A title to real estate which is perfect, with the exception of the title devised by a will, which charged an annuity of \$100 against such land during the life of testator's widow, is, with such lien excepted, a marketable title. *Ditchey v. Lee*, 267, 273 (4).

3. *Unmarketable Title.—Contracts.—Liens.—Assumption of Payment.—Consideration.*—A vendee may contract for a defective title; and he may assume the payment of liens upon the lands conveyed either as a part of the consideration named in the deed or in addition to such consideration.

Ditchey v. Lee, 267, 273 (5).

VENIRE DE NOVO—

Motion for, see PLEADING, 48, 49.

VERDIOT—

See TRIAL, 35-47.

VOLENTI NON FIT INJURIA—

See NEGLIGENCE, 7.

WAIVER—

See INSURANCE.

Of right to object to committee appointed to assess damages because of diversion of stream, see MUNICIPAL CORPORATIONS, 3; *City of Huntington v. Amiss*, 375, 379 (5).

Jurisdiction of subject-matter, not the subject of, see JURISDICTION, 8; *Steinmetz v. G. H. Hammond Co.*, 153, 159 (7).

Of disqualification of interested member of board of commissioners, see COURTS, 4; *Carr v. Duhme*, 76, 82 (8).

Of right to question jurisdiction on appeal, see APPEAL AND ERROR, 68; *Foley v. O'Donaghue*, 134, 135 (1).

Of right to question regularity of appointment of special judge or taking of change of venue, see ACTION, 4; *Whitesell v. Strickler*, 602, 620 (26).

WATERS—

Cities have right to divert natural watercourses for drainage purposes, see MUNICIPAL CORPORATIONS, 1; *City of Huntington v. Amiss*, 375, 378 (2).

WIDOWS—

See ELECTION; WILLS.

WILLS—

Exhibits in complaints to contest, see PLEADING, 86-88; *Heaston v. Krieg*, 101.

Complaints in contest of, see PLEADING, 86-89.

Judgment in suit by administrator to sell testator's land to pay debts, not *res judicata* as to widow's rescission of election not to take under will, see JUDGMENT, 27; *Whitesell v. Strickler*, 602, 616 (18).

Where evidence on question of undue influence is insufficient, not error to exclude declarations of plaintiff's husband in relation thereto, see EVIDENCE, 5; *Heaston v. Krieg*, 101, 119 (26).

Where ineffectual, will be upheld as deeds if possible, see DEEDS, 5; *Heaston v. Krieg*, 101, 115 (23).

Executor should settle estate, without regard to heirs' right to contest the will, see DECEDENTS' ESTATES; *Foley v. O'Donaghue*, 134, 138 (5).

Burden of proof in suit to set aside prior will and to probate a subsequent one, see TRIAL, 53; *Heaston v. Krieg*, 101, 121 (30).

Competency of physician of testator to testify in contest of, see WITNESSES; *Heaston v. Krieg*, 101, 117 (25).

1. *Devises.—Charges on Land.—Words and Phrases.—Forfeitures.—Consideration.*—A will devising lands to testator's daughter "on condition" that she pay the mother \$100 annually, and making such payment a charge on the land, but making no provision for a forfeiture or a devise over in case of a default, merely encumbers such land with such payment, the collection of which may be coerced by foreclosure, the word "condition" being used in the sense of "consideration."

Ditchey v. Lee, 267, 273 (3).

2. *Contest.—Estoppel.—Executors and Administrators.—Final Settlement.*—The administration and final settlement of an estate, by the executor, as prescribed by the terms of the will, with the full knowledge of the heirs, does not constitute an estoppel *in pais* preventing their right to contest such will

Foley v. O'Donaghue, 134, 137 (2).

3. *Contest.—Limitation of Actions.—Statutes.*—The three-year period given by statute (§2766 Burns 1901, §2596 R. S. 1881) in which to contest a will is a substantive right which cannot be abridged by the courts, and which is not strictly a statute of limitations.

Foley v. O'Donaghue, 134, 137 (3).

4. *Contest.—Executors and Administrators.—Final Settlement.—Res Judicata.*—The executor's final settlement of the testator's estate, as prescribed by law, does not preclude a contest of the will by the heirs. *Stuckwisch v. Kamman*, 166 Ind. 672, followed.

Foley v. O'Donaghue, 134, 137 (4).

WILLS—Continued.

5. *Contest.—Parties.—Executors.*—Where the executor of a will has been discharged on final settlement, he is not a proper nor necessary party to a contest of such will.
Foley v. O'Donaghue, 134, 138 (6).
6. *Probate.—Setting Aside.—Establishing Another in Same Action.*—A devisee and legatee under a subsequent will may contest a prior probated will and propound such subsequent will for probate in the same action.
Heaston v. Krieg, 101, 108 (8).
7. *Time of Taking Effect.*—A will takes effect at the death of the testator.
Heaston v. Krieg, 101, 108 (5).
8. *Conditions.—Implied.*—Ordinarily, the courts will not construe the performance of certain things mentioned in a will to be performed by a legatee as a condition to the taking effect of the legacy, such testator having a complete remedy at all times by revocation.
Heaston v. Krieg, 101, 109 (6).
9. *Conditions.—Care and Support.—Consideration.—Contracts.*—A will reciting that in consideration of love and affection and the legatee's taking care of and supporting testator during the remainder of her life, certain property is bequeathed to such legatee, is not necessarily upon a condition subsequent, since the condition of care and support does not go to the whole consideration.
Heaston v. Krieg, 101, 109 (7).
10. *Conditions.—Intention.*—Conditions in a will are not favored, and unless expressly stated or clearly intended, they will not be implied.
Heaston v. Krieg, 101, 109 (8).
11. *Sustaining.—Construction.*—Courts will sustain a properly executed will where the intent is clear, if it can consistently with the rules of law.
Heaston v. Krieg, 101, 109 (9).
12. *What Are.—Statutes.*—Prior to the statute of wills of 1837 (1 Vict. c. 26) almost any kind of a testamentary document disposing of or affecting property was entitled to probate.
Heaston v. Krieg, 101, 110 (11).
13. *Definition.*—A will is an instrument executed with the formalities required by law, whereby the testator makes a disposition of property to take effect at his death.
Heaston v. Krieg, 101, 111 (12).
14. *Provisions.—Contracts.*—It is not fatal to a will as such that it contains provisions of a contractual nature.
Heaston v. Krieg, 101, 111 (13).
15. *Provisions.—Contracts.—Probate.*—A document of a contractual and also of a testamentary character cannot grant a present interest in, and at the same time bequeath, the same property; but such document may be probated as a will when it contains a devise or bequest, if it be properly executed as a will.
Heaston v. Krieg, 101, 111 (14).
16. *Animus Testandi.—Parol Evidence.*—A document stating that in addition to certain property "there shall be paid to" plaintiff "at the death of" testator "the whole of the residue of the estate, real, personal and mixed, of which she shall die seized" shows an *animus testandi*, parol evidence being unnecessary to establish same.
Heaston v. Krieg, 101, 112 (15).

WILLS—Continued.

17. *Property Conveyed.—Deeds.—Description.*—A document, executed with the formalities of a will, giving to plaintiff at decedent's death all of the property of which she shall "die seized," cannot operate as a conveyance in *presenti*, since it is void for such purpose for want of description.
Heaston v. Krieg, 101, 113 (17).
18. *Contracts.—Care and Support.—Conditions Subsequent.*—Where testator agreed to bequeath to plaintiff, in consideration of care and support, all the property of which testator might "die seized," and testator refused to live with plaintiff, the plaintiff cannot recover such property at testator's death.
Heaston v. Krieg, 101, 113 (18).
19. *Future Wills.—Provision against Making.—Contracts.—Testamentary.*—A writing, executed by an elderly widow, in the form of a will, purporting to give to plaintiff certain property absolutely, as well as certain other property of which she might "die seized," on plaintiff's performance of certain services, and providing that the same shall supersede any will theretofore or thereafter executed, and further providing certain legacies to others, is testamentary, the testator still having the power of transfer *inter vivos*.
Heaston v. Krieg, 101, 113 (19).
20. *Animus Testandi.—Parol Evidence.*—A document, properly executed as a will and incapable of operating in any other way, will be treated as testamentary, the *animus testandi* being necessarily implied, parol evidence to overthrow such intent being inadmissible.
Heaston v. Krieg, 101, 114 (20).
21. *Conveyances.—Construction.*—Where a document is capable of being construed as a will and of a conveyance in *presenti*, the latter of which constructions nullifies the document, it will be construed as a will, thereby sustaining same.
Heaston v. Krieg, 101, 114 (21).
22. *Powers.—Express.—Implied.*—Where the widow was given power to dispose of one-half of her husband's estate by his will, her disposition thereof in the prescribed manner is valid whether her will refers to the power contained in her husband's will or not, such intent being implied from the act.
Heaston v. Krieg, 101, 117 (24).
23. *Widow's Election.—Decedents' Estates.*—A widow has the right, free from any misrepresentation, concealment, suppression of facts, or appeals to duty, to make her election whether to take under her husband's will.
Whitesell v. Strickler, 602, 610 (9).
24. *Widow's Election.—Time for.*—Under §2666 Burns 1901, Acts 1885, p. 239, a widow has one year from the admission of her husband's will to probate, to elect whether she will take thereunder.
Whitesell v. Strickler, 602, 610 (10).
25. *Widow's Election.—Duty of Courts Concerning.*—Courts will carefully scrutinize all outside influences brought to bear on a widow in order to induce her to make her election whether she will abide by, or reject, the provisions for her in the will of her husband; and if such influences were harmful, the courts will protect the widow.
Whitesell v. Strickler, 602, 611 (11).

WILLS—Continued.

26. *Widow's Election.*—*Fiduciaries.*—*Burden of Proof.*—In a suit by a widow against the heirs at law of her deceased husband to set aside her election not to take under her husband's will, the burden rests upon such heirs to prove that such election was fair and equitable, and free from undue influence.
Whitesell v. Strickler, 602, 612 (12).
27. *Widow's Election.*—*Setting Aside.*—*Fraud of Third Party.*—That the fraud, which induced a widow's election to renounce the provisions of her husband's will, was that of a third party who received no benefits therefrom, is no defense to a suit to set aside such election. *Whitesell v. Strickler*, 602, 614 (14).
28. *Widow's Election.*—*Failure to Make.*—Failure by a widow to file her election to accept or renounce the provisions of her husband's will, within one year from the probate thereof, constitutes an election to take under such will.
Whitesell v. Strickler, 602, 618 (21).
29. *Widow's Election.*—*Rescission.*—*Limitation of Actions.*—A widow's rescission of an election to take under her husband's will, in the absence of fraud, must be made within one year from the probate of such will.
Whitesell v. Strickler, 602, 618 (22).
30. *Widow's Election.*—*Rescission.*—*Limitation of Actions.*—A suit by a widow to rescind her fraudulently procured election to take under the law instead of her husband's will, may be maintained at any time within the six-year statute of limitations.
Whitesell v. Strickler, 602, 619 (23).
31. *Widow's Election.*—*Fraud.*—*Laches.*—Where defendant by fraud secured her aged mother to renounce the provisions of her husband's will, a suit brought before the final settlement of his estate, and within a reasonable time after the discovery of the fraud by such mother, shows a sufficient excuse for such delay.
Whitesell v. Strickler, 602, 619 (24).

WIND MILLS—

See NEGLIGENCE, 1-6; *Flint & Walling Mfg. Co. v. Beckett*, 491.

WITNESSES—

Competency.—*Waiver.*—*Evidence.*—*Wills.*—*Executors and Administrators.*—*Legatees.*—In an action to set aside the probate of a prior will, and to probate therefor a subsequent will, the physician of the testator is incompetent, over the objections of the legatee of such subsequent will, to testify to things learned in his professional capacity, though the executor of the prior will expressly waived any objections to such competency.
Heaston v. Krieg, 101, 117 (25).

WORDS AND PHRASES—

See MAXIMS.

"Void," meaning of in insurance, see INSURANCE, 11; *Glens Falls Ins. Co. v. Michael*, 659, 678 (11).

"Vacancy" in office, see ELECTIONS, 14; *State, ex rel., v. Ives*, 13, 18 (6).

"Findings" equivalent to "decision" in motions for a new trial, see APPEAL AND ERROR, 72; *Ellison v. Ganiard*, 471, 481 (2).

WORDS AND PHRASES—Continued.

Devise, "on condition" creates a charge upon land, see *WILLS*, 1; *Ditchey v. Lee*, 267, 273 (8).

1. "*Purview*."—"Purview" ordinarily means the enacting part, or body, of a statute, as distinguished from the preamble.
State, ex rel., v. Ives, 13, 18 (5).
2. "*Paid*."—The word, "paid" is often loosely used and is always liberally construed.
Heaston v. Krieg, 101, 112 (16).
3. "*Negligence*."—"Negligence" is a negative word and imports the absence of the degree of care which it was the duty of defendant to use.
Lake Erie, etc., R. Co. v. Ford, 205, 211 (6).
4. "*Invitation*."—*Inferences of*.—*Private Ways*.—*Use of*.—"Invitation," as used in referring to a license to enter the premises of another, imports not only an actual bidding but also an allurements or enticement; and an invitation to use a way may be implied from the manner of constructing same and the continued use thereof by plaintiff.
Baltimore, etc., R. Co. v. Slaughter, 330, 337 (5).
5. "*Bribe*."—A "bribe," as used concerning elections, means any gift, advantage or emolument offered, given or promised to any elector to influence his conduct or vote.
Tinkle v. Wallace, 382, 386 (3).
6. "*As*."—*Statutes*.—*Intoxicating Liquors*.—The word "as" in the phrase "engaged in business as a wholesale dealer," as used in §7283 Burns 1901, Acts 1897, p. 253, §3, is used in the sense of "like" or as illustrating the kind of wholesalers referred to.
State v. Bock, 559, 566 (8).
7. "*Who does not sell*."—*Intoxicating Liquors*.—*Statutes*.—The clause "who does not sell," as used in §7283 Burns 1901, Acts 1897, p. 253, §3, merely defines the character of the wholesalers who are exempt from procuring a license to sell intoxicating liquors.
State v. Bock, 559, 566 (9).
8. "*Wholesale Dealer*."—*Intoxicating Liquors*.—*Statutes*.—*Reference to Prior Statutes*.—In determining the meaning of the words "wholesale dealer," as used in §7283 Burns 1901, Acts 1897, p. 253, §3, the court, as an aid, will look to the use of such words in the United States statutes (20 Stat., pp. 333, 334).
State v. Bock, 559, 566 (10).

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